Review Report
on the
Special Investigations Unit Reforms
prepared for
the Attorney General of Ontario
by
The Honourable George W. Adams, Q.C.

February 26, 2003

The Honourable George W. Adams, Q.C.
2 St. Clair Avenue East Suite 1202 Toronto Ontario M4T 2T5 (416) 515-2797 Fax (416) 515-7862

February 26, 2003

The Honourable Norm Sterling
Attorney General
Ministry of the Attorney General
720 Bay Street
11th Floor
Toronto, ON
M5G 2K1

Dear Minister:

Please accept my review report on the reforms pertaining to the Special Investigations Unit. It was an honour to work with the parties. I thank you for the support provided by your Ministry and in particular by Mark Leach, Director of the Policy Branch, and John Lee, Counsel at the Policy Branch.

Yours very truly,

Hon. George W. Adams, Q.C.

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I. Mandate

I was appointed by the Attorney General last August to conduct a consultative review aimed at evaluating the implementation of the 1999 Special Investigations Unit (SIU) reforms. The SIU is Ontario's civilian oversight body concerning death and serious injury of citizens arising in the course of police work. Those reforms stemmed from 25 consensus-based recommendations I facilitated between 1997 and 1998.[1] The Attorney General was also supportive of me again facilitating agreed upon changes in respect of any implementation issues which may have arisen. If other issues were identified and capable of being resolved by facilitated talks, I was asked to recommend an appropriate process.

On August 15, 2002 I wrote a letter to the groups and individuals I had met in the 1997/98 process and invited them to meet with me again. Unlike my last intervention, I was not given a defined set of issues to discuss with the parties. As a result, I asked those who were interested in meeting with me to provide, by September 15, 2002, a list of issues that they would like to discuss. My letter emphasized that I did not want to disrupt the ongoing efforts of the parties to cooperate and escalate existing differences. The responses I received came only from the police community. I toured the SIU offices on August 16, 2002 and asked the Director, Peter Tinsley, to provide me with the implementation status of the 25 recommendations. I received that update on October 25, 2002.

Stakeholder meetings took place during October, November and December. I met twice with most groups and individuals. While many of the organizations had met with me in the earlier 1997/98 process, several of the representatives I met this time had not previously participated. Understandably, therefore, there was some initial difficulty appreciating the difference between this review and the original intervention which had been aimed at producing fundamental change.

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[1] G.W. Adams, *Consultation Report of the Honourable George W. Adams, Q.C. to the Attorney General and Solicitor General Concerning Police Cooperation with the Special Investigations Unit* (14 May 1998).

The design of the review was to receive stakeholder views on the implementation during the first set of meetings and to exchange these perspectives during the second. Throughout the process, I also sought to explore the potential for agreed upon change in respect of implementation issues and other matters raised with me.

The process, of course, was not perfect. There was criticism that the review was too Toronto-centric. It was argued that "the communities" consulted appeared to be more advocates of a particular brand of oversight and, thus, were not really representative of community concerns or were too partisan. Other questioning of the process related to the absence of women's groups and interest groups specialized in disabilities and the need for a broader representation of Ontario's racialized communities.

The scope of the review largely tracked the original facilitation. It would have been difficult to broaden those to be consulted in a review. The experiences of Toronto, if one community had to be singled out, have contributed directly to the creation of the SIU. Many of the community groups most knowledgeable in SIU developments are located there. However, the provincial bodies that participated reflected regional concerns and, as in the original process, I traveled to Thunder Bay to consult with more northern interested representatives. Most groups who care deeply about a public policy are open to the charge of being advocates or too partisan. This criticism, therefore, is one that can be levelled at all groups and organizations participating in a public policy consultation. It was my job to assess the representations and to encourage a problem-solving approach.

I should also acknowledge the criticism that the review process was too focussed on consensus. It was argued that I should just "decide these issues as I see them." The Attorney General, I need to point out, did not request my independent opinion on all issues which might be raised other than as inherent in being asked to conduct "a review". Instead, he requested the facilitation of

agreement and/or the recommendation of other consensus-based procedures which might be appropriate. In short, my mandate was not to provide a legal opinion or to recommend policy changes. However, I have found that in conducting this review some evaluative comment is clearly in order and clearly within the ambit of what the Attorney General would have expected me to do. However, this is an area of public policy where emotions run deep; where working relationships are easily disrupted; and, therefore, where a policy paralysis is possible when recommendations are made without broad underlying consensus. Therefore, a consensus-based policy-making orientation is a reasonable approach provided it does not result in its own inaction where change, however controversial, is demanded.

Finally, on process, I am thankful for the assistance of Mark Leach, Director of the Policy Branch at the Ministry of the Attorney General and John Lee, Counsel, at the Policy Branch. While I am responsible for the content of this report, their help in organizing and supporting the review was essential. I thank them for their hard work and professionalism.

II. Background

The Ontario history of civilian oversight was discussed in my original report. I will not cover that ground in detail again. Through the SIU, the Province seeks to protect the fundamental human rights of all its citizens by ensuring that those charged with enforcing the laws and advancing public safety remain accountable should they violate those rights. The Unit was the policy result of a recommendation of the 1989 Task Force on Race Relations and Policing calling for the creation of an independent agency to investigate police shootings and determine whether charges should be laid. That Task Force was the by-product of several controversial shootings of black men by police. Following this recommendation, the SIU was created in 1990 as part of Ontario's new *Police*

Services Act[2]. Therefore, the SIU is an independent civilian agency which investigates deaths and serious injuries arising out of police work instead of the police investigating themselves. The SIU is an important democratic tool for building the community's trust in the paramilitary organizations we call police.

The following excerpt captures the constant struggle and compromise inherent in civilian oversight systems:

> Defining and thereby limiting, the responsibilities of any civilian oversight mechanism is both a fundamental task and a real challenge. The involvement of civil society in police matters rarely emerges through a consensus among police, government leaders, and non-governmental advocates about the value and functions of such an intervention. More often, civilian oversight is the product of struggles and compromises between those who support it and those who resist it, and between competing visions of how this kind of oversight should function.[3]

Viewed in this light, it is not surprising that civilian oversight continued to be the subject of debate throughout the 1990s in Ontario. A 1992 riot in Toronto precipitated the Government's appointment of Stephen Lewis to examine race relations and policing. Following that examination, the Task Force on Race Relations and Policing was reconstituted on Lewis' recommendation. Lewis also recommended the creation of the Commission on Systemic Racism in the Ontario Criminal Justice System. Both the Task Force and the Commission made recommendations pertaining to the SIU that were not adopted by the Government. In 1994, the Ministry of the Attorney General created a committee composed of community and police organizations and chaired by Michael Code to revise the then existing procedures governing SIU investigations. As consensus proved impossible on a number of key issues, the draft protocol being

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[2] R.S.O. 1990, c. P.15 [hereafter *Police Services Act*].
[3] E. Phillips & J. Trone, "Building Public Confidence in Police Through Civilian Oversight" (Vera Institute of Justice, September 2002) at 5.

discussed never became an instrument of change. In 1996, the Government appointed Roderick McLeod, Q.C. to consider and advise on how the existing system of civilian oversight of police in the Province could be improved given the Government's expressed intention to introduce changes to the *Police Services Act*. Significant changes to the general area of police complaints followed, but the SIU was not affected. The changes to the general complaint system essentially confined civilian oversight to an appellate review function and remain, I was advised, controversial in many of Ontario's racialized communities. They were not consensus-based policy initiatives.

Finally, in 1997, the Attorney General and Solicitor General appointed me to consult with community and police organizations on ways to improve the relationship between the Special Investigations Unit and the police in the specific areas of: (i) timely notification of incidents to the SIU by the police; (ii) control of the incident scene pending arrival and investigation by the SIU; and (iii) timely cooperation of police officers involved in the incidents being investigated. In my report, I emphasized that the purpose of the consultation had been to identify areas of common ground and, through a principled and problem-solving dialogue, to build agreement on needed changes where possible. The 25 wide ranging recommendations demonstrated that the specific issues referred to me were symptomatic of deeper problems. The report represented my estimate of where broad consensus existed. Thereafter, the Attorney General and the Government confirmed my assessment, leading to the implementation of almost all of the 25 recommendations.

III. Overview of Perspectives

This section is intended as a brief overview of some of the broader perspectives of the parties. It is very general in nature and reflects the previous observation that civilian oversight is the product of struggles and compromises. In a process of this kind, it is almost inevitable that many parties will be encouraged to revisit

earlier grievances or emphasize only their current differences. The ease with which criticism is offered arises from the inherent differences between these parties – differences which no set of reforms can completely accommodate. Racialized community groups are concerned about the safety of their members who come in contact with police officers and police groups are concerned about the safety and unfair prosecution of police officers. Real life and death issues are at stake for everyone.

Not all representatives of the individual stakeholder groups adopted the views set out generally below. Indeed, on many issues I will discuss not even the majority of a stakeholder group adopted the views set out. But I would be remiss to ignore various controversial views which are part of the public debate on civilian oversight between and within stakeholder groups. With debate and experience, the position of individuals and groups can change and evolve. Indeed, one of the important aspects of this review has been the frank exchange of perspectives between the parties.

But I would be even more remiss not to emphasize at the outset that all stakeholder groups acknowledged that the reforms under review had achieved or were in the process of achieving their intended purpose and that there had been a vast improvement in the SIU's performance under the guidance of its current Director, Peter Tinsley. The increased public funding has provided the SIU with the resources necessary to carry out its important work in a manner in which police and community groups now have confidence. The regulatory changes have provided an effective regime for SIU investigations reinforcing that essential confidence. In short, real progress has been achieved due to the 1999 reforms.

As important, all police and community representatives framed their proposals as intended to improve the SIU, not to replace it. And all police community representatives expressed an acceptance of the need for civilian oversight in order to maintain public confidence in police services. There was a mirroring

awareness in the African-Canadian community and in other racialized communities that the safety and unfair prosecution of police officers are important issues. Policing can be a very dangerous job requiring split second decisions and community groups generally understood why police officers were concerned over the potential for inappropriate second-guessing by the SIU. They also appreciated the adverse impact on a police officer and on his or her family when an officer is the subject of an SIU investigation and, particularly, where the police officer is charged with a criminal offence. In short, the community groups showed the essential capacity to distinguish police community proposals based on these concerns from objections in principle to civilian oversight.

Finally, all participants agreed that civilian oversight of police work involving deaths and serious injuries, no matter how robust, was no substitute for appropriate social and economic policies to support our racialized communities and for effective police training and leadership in a diverse society. When conducting a review of one small, albeit important, component of policing in Ontario, there can be a tendency to forget about the broader underlying contexts which give rise to the many problems confronting police officers and members of the public with whom they come into contact. The SIU cannot be the policy instrument to solve all these problems. Everyone was reminded of this reality when in the midst of this review, the issue of racial profiling was raised by a *Toronto Star* article which understandably heightened the tension between many of the stakeholder groups.[4] While that issue is relevant to civilian oversight, it is not a matter where the SIU can be asked to give primary leadership. However, the resulting tensions can make the SIU's job more difficult to undertake.[5] Thus, important aspects of the controversy associated with civilian oversight have root causes elsewhere and the solutions lie within stakeholder groups and require changes to other public policies.

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[4] J. Duncanson, "Summit pledges to halt racial profiling" *Toronto Star* (26 November 2002) A17.
[5] T. Tyler, "Racial profiling exists: Crown" *Toronto Star* (18 January 2002) A1; P. Small, "Police union sues Star over race-crime series" *Toronto Star* (18 January 2002) A6.

Police

It is not accurate to consider the police community as a monolith. For example, chiefs of police may have a different viewpoint from police associations on certain issues. Similarly, the Toronto Police Service and the Ontario Provincial Police (OPP) – two organizations with the most contact with the SIU[6] – have opinions which are quite different from those organizations with much less experience involving the SIU. Therefore, the following generalizations must be read with considerable care.

This caveat registered, police officer associations expressed general satisfaction with the implementation of the recommendations, especially in regard to the legal protections that have been accorded to their members. The SIU is seen as a competent investigatory body. Concern instead was raised over the accountability of the SIU and the Unit's mandate. For example, the Police Association of Ontario (PAO) proposed that the SIU adopt a Code of Conduct and a complaint procedure similar to those applicable to police officers. It also proposed that there be a dispute resolution process made available to address disputes between police officers and the SIU arising during an SIU investigation. The PAO further recommended a new definition of "serious injury" be adopted. While this proposed definition is aimed at confining the SIU to truly serious injuries, it is principally a response to a perceived uncertainty surrounding the definitions being applied by the SIU and being recommended to members by the Ontario Association of Chiefs of Police (OACP)[7]. Police associations also expressed concern over the SIU carrying out what are called "incident reviews". SIU incident reviews are now undertaken when it is not immediately clear that an incident falls within the SIU's mandate. The PAO's view is that this is incompatible with the Unit's limited mandate and, instead, would like to see the SIU deciding immediately whether it has the mandate to investigate.

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[6] Two-thirds of all SIU investigations involve either of these two police services.
[7] The OACP definition is at page 33 of this report. The SIU definition is at page 32 of this report.

Not all police associations share the same concerns as described above. The relationship between police associations and the SIU over the past five years has varied depending on the police association. The larger police associations appear to have developed working relationships with the SIU concerning its investigations. When problems do arise, they are usually quickly and effectively resolved. Police associations that have infrequent contact with the SIU have on occasion experienced greater difficulties and these difficulties have tended to infect the police association's future encounters with the SIU. As a result, some associations have called for more radical changes to the SIU while others have pragmatically adjusted to the existing approach and put in place experienced personnel to make it work. Similarly, while most associations agreed that there has been significant improvement in the core competencies of the SIU, there were dissenting views which were the product of specific investigations and prosecutions. For example, I was told that particular charges should not have been laid and that the ensuing prosecution tactics were entirely too adversarial. Understandable concern was expressed for the families of these officers who had been put through the turmoil of a public criminal trial. However, in each case, the police officer appears to have been accorded due process and was ably represented by counsel. Because some of these cases are ongoing, no more can and should be said.

All police associations I spoke with said they were committed to civilian oversight. Nevertheless, they all were very worried about "armchair" second-guessing of split second police officer decisions made under difficult circumstances and in defence of themselves and the public. They, therefore, demanded the highest investigatory standards be met in reviewing the actions of their members and made no apology for the procedural protections accorded by the Regulation.

The Chiefs of Police and Police Services Boards

As both police officers directly accountable to their police services boards and managers of police services, chiefs of police play an important role in civilian oversight and have a unique perspective. Being ultimately responsible for notifying the SIU of an incident, police chiefs have expressed frustration over what they say is an absence of clear guidance as to when the SIU should be contacted. They also expressed concern over the cost to police services for police officer criminal defence lawyers whenever the SIU is called. They questioned the need for an automatic and expensive criminal investigative response each time a serious injury or death has occurred. Instead, the proper approach, they argued, was for the SIU to simply inquire into a matter and only when it has reasonable and probable grounds to believe that an offence has been committed should the SIU embark on a criminal investigation. This would then be the point at which to designate officers as either subject or witness officers and to accord rights of representation. To the OACP, there is nothing inherent in being a police officer – or a doctor, firefighter or paramedic – that compels an automatic criminal investigative response each time a serious injury or death occurs in the context of a professional encounter.

Chiefs of police also shared several of the concerns of the police officers they manage. For example, the OACP and the SIU have been engaged in a lengthy debate over issues such as the Unit's accountability and mandate. Like the police associations, it advocated a Code of Conduct for SIU investigators and the Director and a related complaint mechanism. The OACP has also proposed its own definition of "serious injury"[8] and that the SIU only be contacted when a chief of police has determined that there is a serious injury or may have been criminal wrongdoing. Indeed, these proposals appear to have been recommended to the OACP's membership for unilateral adoption in the face of SIU and community objections. The current SIU definition is the product of a controversial agreement

[8] *Ibid.*

between the SIU and the OACP in 1991.[9] Community groups had not been consulted at that time and objected. However, with the passage of time, the definition has come to be accepted. The OACP also questioned the SIU's policy of incident reviews which it sees as a unilateral expansion of the Unit's mandate.

The OACP has been active in developing so-called guidelines to assist chiefs of police in determining which police documents should be given to the SIU in compliance with the duty to cooperate. I was told that the Association is often asked for advice and believes there should be a uniform approach across the Province. While an initial draft was vigorously rejected by the SIU, by the time of my appointment the OACP had made several significant concessions in response to the SIU's comprehensive criticism.[10] Unfortunately, these OACP efforts have appeared to racialized community groups as outright opposition to the SIU and have undermined confidence in the chiefs' enforcement role of the duty to cooperate as accorded by the implemented recommendations. Fortunately, there have also been inspiring acts of cooperation between chiefs of police, police service boards and community groups. For example, in 2002 the International Association of Chiefs of Police at its 109th Annual Conference jointly honoured community and police representatives from the City of Toronto for participation and leadership shown at the "Alternatives to Lethal Force by Police" community conference held in June 2000.

The OACP pointed to what it perceived as the SIU's lack of cooperation with parallel criminal investigations and the chiefs' administrative investigations. While the OACP wishes its members to provide as much information to the SIU as reasonably possible, it complained that the SIU, due to its confidentiality policy, did not reciprocate. The OACP requested full disclosure of SIU investigative findings to chiefs of police.

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[9] See: A. Duffy, "Deal limits probes into shootings by police" *Toronto Star* (13 July 1991) A8; "A toothless tiger" *Toronto Star* (15 November 1991) A24; "Groups want head of police agency to resign" *Toronto Star* (26 February 1992) A5.

[10] SIU, "SIU Position Paper: Proposed OACP Guidelines on Production of Information to SIU Investigation" (1 February 2002).

Importantly, the OACP is willing to continue to work with the SIU to bridge their outstanding differences and sees value in ongoing dialogue. The OACP also acknowledged that the SIU has vastly improved in respect of its core investigational responsibilities.

Community Groups

The community representatives were troubled by police proposals for change to the SIU in what was styled as a review process. They too accepted that the SIU had improved considerably since the reforms were implemented, but felt that their 1998 concessions in accepting formal recognition of the subject/witness officer distinction and related representational rights for police officers were now being used against them. The PAO wanted to retain those protections while seeking further changes in the name of accountability, but which communities perceived as aimed at undermining the SIU. The OACP was also seen to be resiling from the earlier reforms it had agreed to by complaining that they were now too expensive and by seeking to narrow the SIU's mandate.

Community groups were not sympathetic with concerns about the costs of SIU investigations. They disputed the accuracy of the alleged costs and argued that nothing in the implemented recommendations imposed the costs of legal representation of police officers on police services boards. Instead, in contrast to the OPP, many police services boards had voluntarily assumed such costs or had failed to bargain less costly alternatives. In any event, the community groups felt that the resulting costs were a fair price to pay for broad acceptance of Ontario's independent civilian oversight system. Community groups also contended that the OACP's real concern was one of trying to exert control over the SIU and the cost issue was being used as a pretext. Thus, if further changes to the SIU's jurisdiction were to be made, community groups proposed a

widening of its mandate to include all civilian complaints and an expansion of the definition of "serious injury" to include psychological harm.

Community representatives feared that a SIU Code of Conduct and complaint process and any other form of dispute resolution process would be used by already powerful police associations and police services as tools to frustrate SIU investigations. Communities saw no evidence of SIU misconduct and pointed out that investigations had resulted in few charges and only a handful of convictions over the entire history of the SIU. Community groups argued that police officers are subject to a Code of Conduct and SIU review because they carry weapons – a context not applicable to SIU investigators. Community groups stressed that SIU review remained fragile and, indeed, that additional sanctions were required to deal with continuing uncooperative police chiefs and police officers. It was felt that civilian oversight did not require its own oversight mechanism other than what now exists. The SIU advertises its own complaint procedures which are available to the police community. The investigators are accountable to the Director and subject to discipline. The Director is accountable to the Attorney General. Complaints can also be made to the Ombudsman. Community representatives worried about the vulnerability of the SIU and the Director to powerful police interests and saw no justification for police demands in the name of so-called greater accountability. It was pointed out that a police officer who believes he or she has been improperly charged and prosecuted has recourse to the courts in the same way as any member of the public who feels similarly aggrieved.

Some community groups also contended that the SIU lacks transparency in its operations and sufficient racial diversity in its staffing. They noted that police interests, being better funded and organized, have easier access to government and the SIU Director than they do. Indeed, some wondered whether this review was a product of this imbalance in influence. The lack of public access to the Director's investigative reports to the Attorney General and the failure of police

services boards to make public the administrative reviews conducted by chiefs of police were also cited as impeding the public's right to know and public confidence. However, the Director's initiative in creating a community resource committee to keep community groups better informed of the general activities of the Unit was appreciated. Although there have been only two meetings to date, community groups acknowledged that the SIU was beginning to redress the need for more transparency.

The community groups saw a value in the Director of the SIU making recommendations on improvements to police practices that could avoid civilian deaths and serious injuries. The Unit's experience was seen as an important source for preventative public policies. However, the Office of the Chief Coroner advocated caution in this area given that the SIU's function is focussed on possible criminal wrongdoing. An expanded role could compromise that important function while encroaching on the role of other institutions better designed to make informed recommendations. As a practical matter, the SIU does alert chiefs of police to areas which an administrative review might consider.

Finally, concern was expressed that the Justice Prosecutions Unit may not be receiving sufficient resources to successfully prosecute the charges laid by the SIU. Reference was made to the paucity of convictions overall and to specific prosecutions where it was believed that convictions should have been obtained. It was argued that more senior Crown prosecutors and more lawyers generally should be assigned to the Unit.

Despite all these concerns, community groups recognized that substantial progress had been made and, by and large, were willing to continue to work within the implemented recommendations. However, should there be any possibility of considering the kinds of wide-ranging reforms requested by certain police groups, then community groups also wanted consideration of a much

broader SIU mandate and more effective methods for enforcing the police community's duty to cooperate.

The SIU

Consistent with the earlier consultation, the SIU was not treated as a formal party to the review. Rather, it was requested to provide background information related to the Unit's implementation of the recommendations and to identify any related issues.

Implementation of the recommended increase in funding has allowed the SIU to carry out its mandate more effectively. Following the implementation of the recommendations, the SIU underwent a renewal of both its capital and human resources. The SIU now has the equipment needed to carry out its mandate. It has hired very experienced investigative staff. Several of these investigators come from a civilian investigatory experience and not from police services. The SIU undertakes formal ongoing training benchmarked at the highest levels of investigatory competence under the leadership of a full time Training Coordinator. Hiring interviews have been conducted by the SIU with both community and police association representation on the hiring panels. The SIU is committed to achieving a racially diverse workforce without sacrificing investigatorial competence.

Based on stakeholder reactions, issues relating to the competency of SIU investigators appear largely of the past. However, the SIU appreciates that its staff's performance will always be under the microscope and constant vigilance is in order. There has been considerable improvement in how long it takes to close cases. The SIU compiles annual statistics regarding the number and type of occurrences it investigates and a brief review of these statistics show that each year the SIU is involved in approximately 150 cases resulting in a handful of charges. Before the implementation of the recommendations, the percentage of

cases closed within 30 days was approximately 30%. In the 2001-02 fiscal year, this percentage has increased to almost 79%.

The SIU has been working with chiefs of police and police associations since 1999 to clarify various operational issues. At times these discussions have been difficult for everyone involved. However, dialogue continues and this is a testament to the dedication of all participants. Behaviours have changed for the better as a result of this dialogue and increased understanding and information sharing has taken place. Furthermore, where open lines of communication exist we see increased cooperation of police officers with SIU investigations. The difficulty for the SIU has been in dealing with the PAO. Unsurprisingly, the PAO's public demand for the SIU Director's resignation has strained the relationship between that organization and the SIU. This public dispute has served no one's interest. However, the SIU continues to meet and talk with individual police association members of the PAO, and the expertise of the Ontario Provincial Police Association (OPPA) in SIU matters should help improve the situation with that association's return to PAO membership.

The SIU emphasized that on issues regarding its mandate it is open to change provided there are documented problems. Change, however, cannot be achieved based only on rhetoric and without a broad consensus among interested parties including community groups. The SIU has promulgated a complaint procedure in response to claims for greater accountability, but has yet to receive a complaint. It also instituted incident reviews to try and bring down the costs of more doubtful interventions, but has met jurisdictional protests from those it was seeking to assist.

The SIU has made progress in its outreach efforts to community groups with the establishment of the Director's Resource Committee. It acknowledged that much more work needs to be done in conveying its existence to northern Aboriginal communities. The SIU recognizes that in order to attract community and police

confidence the Unit must continuously strive to work with these groups and ensure an appropriate transparency in its operations. Thus, its operational orders are largely available to the public and it is open to a working relationship with all stakeholders who are willing to respect its independence and professional integrity.

The SIU pointed out several issues which might be raised by the parties during the review and they were. These issues are discussed in the following section.

IV. Implementation of the Recommendations – The Review

In reviewing the status of each recommendation, I do not intend to identify every issue or complaint raised with me. This process was not constituted to identify or unearth the minutiae of differences that inevitably arise within such a complex and controversial undertaking as civilian oversight. Similarly, I have not attempted to list all the many achievements of the SIU. Rather, I will emphasize highlights and key issues.

Recommendation 1:
The SIU should be resourced in a manner commensurate with its important mandate.

The SIU's budget for the fiscal year before the implementation of this recommendation was slightly less than $2.2 million. A shortage of resources was believed to be a key impediment to the operations of the Unit in 1997-98. At that time, the SIU relied frequently on the OPP for forensic investigation assistance and the involved police service for the interviewing of secondary and tertiary witnesses. There were also many occurrences where the SIU allowed the involved police service to investigate the entire incident while the SIU oversaw that investigation. These and other justifiable criticisms of SIU performance were

symptomatic of inadequate funding. Without sufficient resources, no regulatory framework can function in an acceptable manner.

The government subsequently responded to this recommendation by significantly increasing the Unit's resources. Following the implementation of this recommendation, the SIU's budget was increased to over $4.7 million for the 1999-2000 fiscal year. For 2002-03, the SIU's budget is just over $5.2 million. There was general agreement that the Unit appears to be now well equipped both in terms of equipment and personnel.

The Unit moved into new premises in May 2000 and is now located at the intersection of Highways 401 and 427, near Pearson International Airport. These new premises not only allow easier deployment of investigators to incident scenes, but were specifically designed to meet the Unit's operational requirements. As discussed in the SIU's 2000-01 Annual Report, SIU investigators now have state-of-the-art audio-video interview rooms, secure evidence and file storage facilities and project rooms. There is also sufficient room to support the SIU's stand-alone Forensic Identification unit which includes a fully-equipped laboratory. The SIU's forensic technicians are now fully equipped with enough scene examination and evidence gathering supplies to investigate effectively.

In January 2000, 20 new investigators from across the province joined the SIU. These investigators included a recently retired Detective from the Toronto Police Homicide Squad and senior retired investigators from the RCMP, OPP and other police services, each with over 20 years of policing experience. A number of experienced investigators with non-policing backgrounds were also hired. In February 2001, 13 new investigators with a similar set of backgrounds and experience joined the Unit.

While the Unit is still unable, at times, to respond quickly to incidents that occur in remote communities, the SIU has developed Operations Order 003 recognizing that, in such circumstances, immediate coordination between the police and the SIU is necessary. It has also developed more expeditious modes of transport to remote locations for its staff. The SIU understands it cannot credibly claim the lead investigator role if it takes several hours to reach the scene of an incident. Police services understand that when they are accorded the lead their efforts must be professional and transparent to meet with SIU and community approval. Such cooperation also requires civil and arms' length business relationships between the SIU and the police to command community confidence.

Recommendation 2:
A detailed and clear Standard Operating Procedure should be adopted as a lawful regulation. It shall explicitly provide that failure of a police officer to comply with any of its provisions is serious misconduct. The Code of Conduct should be amended accordingly. If the regulation's enforceability is to be through the normal disciplinary procedures at the direction of the chief of police, the SIU must be accorded the status of complainant.

This recommendation was implemented in part by the coming into force on January 1, 1999 of Ontario Regulation 673/98 (the Regulation) and Ontario Regulation 674/98. The former sets out the conduct and duties of police officers involved in SIU investigations. The latter amended the Code of Conduct in the *Police Services Act* by adding as a category of neglect of duty the failure to comply with a provision of Ontario Regulation 673/98. This made the failure to comply with the Regulation a misconduct offence under the *Police Services Act*.

Neither the SIU nor its Director was accorded the express status of complainant. Although the coming into force of the regulations appears to have significantly improved cooperation among police officers with SIU investigations, there continues to be situations where a police service, police association or a police

officer's lawyer initially confronts the SIU. While these occasions continue to decrease and may be the product of inexperience, any doubt over the Director's standing to seek enforcement does not help. While a contextual interpretation of the phrase "member of the public" could reasonably include the Director[11] and no tribunal or court has yet refuted the Director's obvious need to be accorded complainant status[12], an amendment to the *Police Services Act* would be salutary. *Abundans cautela no nocet.* [Abundant or extreme caution does no harm.] For example, s. 277.40(3) of the *Education Act*[13] provides:

> *For greater certainty*, a complaint made by a secretary of a board under this section shall be deemed to be a complaint made by a member of the public under clause 26 (1) (a) of the *Ontario College of Teachers Act, 1996.* [emphasis added.]

No one disputes the need for the Director to have standing to seek an enforcement of the Regulation.

The full extent of the "duty to cooperate" has sometimes become an issue. For example, there has been debate between several police services and the SIU on a requirement to furnish police equipment and other physical items of relevance to the SIU for its investigation when these items are within the police service's custody and control. Similarly, the production of certain police documents with or without a search warrant has been debated on the basis of relevance and privacy issues. These documents and records include personnel files, public complaint files, discipline files and the photographs and fingerprints of officers.[14] I am

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[11] The Director is not excluded from being "a member of the public" in contrast to the exclusion of other officer holders by s. 57(7) of the *Police Services Act*.

[12] Compare *Nova Scotia Advisory Council on the Status of Women v. North Sydney (Town) Police Department* (1992), 15 Admin. L.R. (2d) 218, [1992] N.S.J. No. 107 (N.S.S.C. (T.D.)).

[13] R.S.O. 1990, c. E.2.

[14] Since the enactment of the Regulation, the SIU has consistently maintained that the duty to cooperate in s. 113(9) of the *Police Services Act* extends to the provision by police services, on request by the SIU, of all relevant and non-privileged police documentation, except for subject officer notebook entries related to the incident under investigation. However, as a practical matter, the SIU has refrained from pursuing the production of various other police records that

unwilling to be drawn into theoretical and complex differences lacking the discipline of a concrete set of facts and the legal presentations of talented lawyers. I also see nothing that well meaning parties cannot overcome through their own efforts and this has been happening at the working level. All parties, including the SIU, must be sensitive to problems which can only delay and compromise the integrity of the SIU's investigation. Complex constitutional litigation is not in the interest of anyone.

To date, the SIU and the police community have been able to resolve all differences arising out of specific investigations. There have been very few occasions when the Director has felt the need to resort to or threaten to resort to the complaints process. The SIU has only made three actual complaints of non-compliance with the Regulation, while issuing threats of complaint in other cases. While formal notices of possible complaints have been more frequent than actual complaints, they too represent only a very small number of cases. In each case where a formal complaint was lodged by the SIU, steps taken by the involved police service to redress the grievance eventually led to the complaint's withdrawal. The paucity of complaints, actual or threatened is a positive reflection of the significant reduction of instances of non-cooperation by police officers and police services since the inception of the new Regulation. Specifically, it is the corporate experience of the SIU that incidents of non- or delayed cooperation on the part of witness officers, in terms of interviews and the

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might trigger the same constitutional interest of subject officers such as incident reports or occurrence reports that have been completed in the wake of an incident. For some of the recent case law see *R. v. White*, [1999] 2 S.C.R. 417 and *R. v. Jarvis*, [2002] S.C.J. No. 76. The 2001 OACP "guidelines" document sought to expand the scope of the materials exempt from disclosure to the SIU. However, after receiving the SIU's position paper and meeting with SIU staff on June 7, 2002 significant revisions were made, creating what is now the June 16, 2002 document. Thus, while important differences remain between these parties, the situation is an example of positive dialogue and dialogue which will, I'm satisfied, continue to produce positive results. Some of the issues discussed between these parties include whether s. 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 or the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 or the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 require that some limited types of records only be produced in response to a search warrant. See also *R. v. Fudge*, [1999] O.J. No. 3121 (Ont. S.C.J.) for a somewhat similar debate concerning whether *O'Connor* principles apply.

provision of notes, and non- or delayed notifications of incidents by the police to the SIU, have been significantly reduced since the coming into force of the Regulation. The detailed provisions of the Regulation, its status as a "law" and the potential disciplinary sanctions for its breach have had the intended effect of facilitating SIU investigations and police cooperation with those investigations.

Nevertheless, the ongoing public disagreements between the SIU, the PAO and the OACP are of concern. Both the PAO and the OACP are influential police community organizations which need to pursue courteous dialogue with the SIU and racialized communities before advocating positions which may have serious consequences for stability in this important area of public policy. These disputes can also be quite legally complex and litigation comes with no guarantees. To date, the parties have been very wise to solve their own problems.

A public call for the SIU Director's dismissal has had the potential for impairing the PAO's credibility with third parties given the sparse record relied upon by it to justify this drastic demand. If it wants to play the key policy role an association of its stature can play, it must foster a working relationship with the SIU while still championing the interests of its members. These sometimes-conflicting interests require great skill, patience and leadership. What the PAO does not need is the image of being only ideological when it comes to civilian oversight. The troubling way that image can come across to the outside world is suggested by the reasons of a very experienced trial judge in *Wiche v. Ontario*.[15] In this respect, Ground J. stated:

> Evidence given by Wiche and other police witnesses at trial that they believed the SIU to be incompetent and incapable of carrying out a fair investigation must be given little weight. The witnesses failed to cite any examples of negligent or incompetent behaviour on the part of the SIU or any basis on which their opinions were formed. There appeared to be on

[15] (2001), 38 Admin. L.R. (3d) 194, [2001] O.J. No. 1850 (Ont. S.C.J.) [cited to O.J.].

> the part of certain of the police witnesses and certain police associations, an almost Pavlovian reaction against a civilian agency investigating the conduct of police officers in carrying out their duties and against the idea that such an agency could conduct an investigation which could be fair to police officers. This is particularly surprising when the statistics given in evidence establish that in almost 97% of the cases, the investigation exonerates the subject police officer.[16]

The PAO has raised particular situations where officers have been charged, as did the Thunder Bay Police Association. However, there are or were competing views in all these cases and we have pre-trial and trial processes and legal rights in place to deal with such concerns. Civilians have the experience of being charged and acquitted. Community representatives did not understand why the police should be in any preferred position.

Several community groups argued again for the creation of a provincial offence to address police failures to cooperate with the SIU and the use of outside senior trial counsel as prosecutors.[17] A likely better first step is to guarantee the Director's standing to lodge a complaint and increase the extent of appropriate partnerships *among police and community stakeholders* and with the SIU. Civilian oversight in the form of the SIU was intended to assist chiefs of police in shouldering their daunting duties, not to be an irritant. The fact that the SIU overwhelmingly clears officers should be seen by the PAO as an endorsement of good policing.

Recommendation 3:

The regulation shall provide that, in respect of every incident, a police officer from the involved police service will be designated to liaise between

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[16] *Ibid.* at para. 61.

[17] For an attempt by one affected family to enforce the duty to cooperate by a civil action see: *Odhavji Estate v. Woodhouse*, (2000) 52 O.R. (3d) 181 (Ont. C.A.) leave to appeal to S.C.C. granted [2002] S.C.C.A. No. 75.

the chief of police of that service and the SIU investigators to ensure full understanding of the investigatory processes and the prompt enforcement of the regulation when necessary.

This recommendation has been implemented in s. 2 of the Regulation. That section allows a senior officer to act in place of the chief in all matters related to the SIU investigation. Many larger police services now have a standing chief's designate who is familiar with SIU procedures and personnel. This position has helped to produce better working relationships between the SIU and a police service and has facilitated the resolution of problems that arise in certain cases involving the police service. In respect of smaller services, whoever is designated is likely to be the senior officer available at the time and who may not have had sufficient contact with the SIU to be comfortable in liaising on the occasion of what is usually a crisis. Any such local discomfort can be contagious in a criminal investigation with resulting undue conflict and delay. Indeed, this seems to have occurred. The OACP has attempted to develop a protocol to assist but this effort has become surrounded in controversy because it materially deviates from SIU practice and has been perceived as a unilateral initiative. A preferable approach is for the SIU to create a package of materials for chiefs and their designates, possibly consulting with the OACP, and to convene working update conferences once a year.

This initiative would only broaden existing joint initiatives. In particular, the SIU has regularly participated in a senior police leadership course developed by the OACP in conjunction with the Rotman School of Business. The course candidates in this program are generally of the ranks to serve as a chief's designate. The SIU's contribution is a combination of a presentation and an exercise conducted by the SIU's investigative supervisors entitled "Walk a Mile in Our Shoes".

The SIU has recently instituted a system of "external case reviews" available on the request of a police service. This is a voluntary process in which the SIU and the police service discuss all aspects of and concerns related to an investigation. The largest scale review of this nature occurred on September 23, 2002 and involved the OPP Commissioner as well as several other staff of the OPP. A variety of issues were discussed at length with the participation of affected officers and the results were very positive for all involved.

Finally, an informal practice has been adopted whereby any dissatisfaction with the investigation process on the part of a chief of police or expressed by a third party on behalf of the chief to SIU scene personnel is reported immediately to the Director. The Director attempts within 30 minutes to reach the chief directly to address these concerns. The approach has prevented minor issues from growing into major problems and has enhanced both working relationships and effective investigations.

Recommendation 4:

The regulation should provide that the SIU be notified immediately whenever its jurisdiction is reasonably suspected to be engaged.

This recommendation has been implemented. Section 3 of the Regulation provides that a chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers *that may reasonably be considered to fall within the investigative mandate of the SIU.*

Despite this obligation, the mandate of the SIU has been subject to debate and this debate has at times impacted on the notification obligation. More specifically, the issue of which incidents involve a "serious injury" so that the SIU must be called to investigate continues to be a point of contention in some quarters as evidenced by the purported OACP guidelines definition. The SIU, we saw, operates under a definition that was developed in 1991 by Mr. Justice

Osler, the first SIU Director, in consultation with only the OACP. The definition provides:

> "Serious injuries" shall include those that are likely to interfere with the health or comfort of the victim and are more than merely transient or trifling in nature and will include serious injury resulting from sexual assault. "Serious injury" shall initially be presumed when the victim is admitted to hospital, suffers a fracture to a limb, rib or vertebrae or to the skull, suffers burns to a major portion of the body or loses any portion of the body or suffers loss of vision or hearing, or alleges sexual assault. Where a prolonged delay is likely before the seriousness of the injury can be assessed, the Unit should be notified so that it can monitor the situation and decide its involvement.

The fact that community groups were not consulted became very controversial. However, as previously noted, they have generally come to accept the definition over the years. The issue of serious injury was briefly discussed in my 1998 report where I reported:

> *There was broad agreement that the SIU should be notified immediately whenever its jurisdiction is reasonably suspected to have been engaged.* It is not practical for a police service to attempt to determine the SIU's jurisdiction in a strict legal sense before notification is effected because of the inherent uncertainty of many incidents. The issue of notification must be treated more like that of calling an ambulance - when in doubt call ... Notification can no longer involve a lawyer's interpretation as to the SIU's mandate. Who does what can be sorted out once representatives of the SIU are present... [emphasis added.]

Unfortunately, since then, the OACP and now the PAO have regressed with their own unilateral definitions of serious injury. Both definitions are narrower than the

existing definition which has been used by the SIU for over a decade. The OACP definition could significantly reduce the number of incidents reported to the SIU and has been proposed to reduce the legal cost to police services resulting from SIU investigations. However, it is interesting that police services did not express or emphasize this concern and the case of prohibitive legal costs associated with SIU investigations, as opposed to those from trials and in comparison to internal affairs investigations, was not made out before me.

The OACP definition reads:

> "Serious injury" shall mean:
>
> 1. Injuries that materially impair or interfere with the health of an individual, but does not include:
>   a) fractures, cuts and burns that do not necessitate admission to acute medical care in a hospital, or
>   b) admission to a hospital for observation only.
>
> 2. Allegations, or real evidence, of sexual assault.

The legal costs stem from the cost of counsel retained by police associations on behalf of subject and witness officers involved in an SIU investigation. These costs would ordinarily fall to the officer and his or her police association. However, in many instances these costs are now paid for by police services as a result of provisions in collective agreements negotiated or arbitrated between police services and their respective police associations. Community groups see this complaint as self-inflicted and as an attempt to use the parties' earlier compromise on representational rights as a sword to achieve a reduction in the SIU mandate – a narrowing which was not achieved in the 1998 talks. In particular, they do not understand why police services boards agree to pay for witness officer legal representation given that witness officers are not the subject of an SIU probe and, in any event, have the benefit of a broad immunity if a

redesignation occurs. If a police service board agrees to pay, they question why such boards agree to absorb all of the very high private sector legal fees. It was noted that not all police services pay for counsel as evidenced by the OPP's approach and the OPPA's corresponding cost-effective use of its own in-house counsel. Association staff representatives would obviously be still cheaper. In 1998, the community groups only reluctantly accepted the subject/witness officer distinction, the correlative immunities and right to representation features of the Regulation. Understandably, they now perceive the alleged cost of these police protections being used to shrink the definition of "serious injury" and the SIU's mandate. This is particularly troubling to communities who lack confidence in the general complaints system which process non-SIU issues.[18]

In an effort to address the concern over cost, the SIU implemented a policy of "incident review", whereby the SIU conducts an expeditious preliminary investigation of an incident in order to confirm its jurisdiction prior to launching a full investigation of the matter. The term "incident review" was borrowed from the OPP and represents a process of jurisdictional confirmation. The scheme is set out in detail in paragraphs 4(c) and (d) of SIU Operations Order 002. An incident review which results in the SIU not taking jurisdiction or in the Director exercising his discretion not to investigate is reported only to the Deputy Attorney General in a summary manner and the need for a chief of police to conduct a s.11 inquiry is obviated. Incident reviews are also conducted in the absence of witness or subject officer interviews to avoid the necessity of appointing legal counsel as would be required if designations were to be made. While this seems to work where the issue is confined to the severity of the injury, incident reviews have sometimes become controversial whenever an investigator wishes to speak to any police officer even including a supervising officer in order to understand, in a preliminary way, what happened. Indeed, some police associations have argued that whenever the SIU is involved, regardless of whether there have been

[18] See, for example, Toronto Audit Services, *Performance Audit The Public Complaints Process Toronto Police Service*, by J. Griffiths (Toronto: City of Toronto, 2002). See also J. Duncanson, "Police complaints overhaul urged" *Toronto Star* (23 October 2002) B3.

designations, the officers will retain counsel. And some chiefs of police, along with the PAO, are demanding that the SIU decide whether or not it has jurisdiction before taking any action. As a consequence, incident reviews may not be achieving the full cost reductions intended by the SIU in all cases. While possibly more consultation on the incident review concept before it was initiated may have avoided some of this controversy, the concept remains a useful one and, for the reasons below, the initial adverse reactions can, with discussion and good faith, be overcome.

Community groups emphasized that they were never consulted on the Osler definition and have grudgingly lived with the existing definition of serious injury since its adoption by the SIU in 1991. However, should the definition be re-examined, they have argued for a broader definition that would recognize stand-alone psychological harm. As for the costs to a police service resulting from an SIU investigation, community groups believe this is a price of civilian oversight worth paying.

The 1991 Osler definition of "serious injury" bears some similarity to the definition of "bodily harm" found in the Criminal Code of Canada. For example, "bodily harm" is defined in the Code as any hurt or injury to a person that interferes with the health or comfort of the person and that is *more than merely transient or trifling in nature.*[19] It is noteworthy that this definition of bodily harm does not speak directly to the degree of seriousness of the harm. The Supreme Court of Canada in *R. v. McCraw*[20], however, defined "serious bodily harm" as any hurt or injury, whether physical or psychological, that interferes *in a grave or substantial way* with the physical or psychological integrity, health or well-being of the complainant. The Osler definition, therefore, appears on its surface neither to fully account for the reference to seriousness in the words "serious injury" nor to

[19] Criminal Code, s. 2.

[20] [1991] 3 S.C.R. 72. The term "serious bodily harm" is no longer found in the Criminal Code provision that was examined in the case and, of course, the phrase used in the *Police Services Act* is "serious injury". Therefore, it is that latter statute's legislative history which must be resorted to in any purposive analysis of the appropriate degree of harm for the SIU to be involved.

address the possible psychological element of an injury. Instead, it represents an attempt to operationalize the SIU's jurisdiction accorded by the *Police Services Act* and the related obligation of police services to notify the SIU by providing a workable approach for parties to facts which will vary from case to case. Moreover, while psychological harm has never been part of that definition (nor arguably was it the original basis for community concern), the SIU does require that injuries be in fact serious before it will conduct a full investigation. However, one difficulty may be that the SIU does not publicly record these instances. More public awareness should reduce the OACP's apparent anxiety over this issue. It should also be observed that the OPP – one of the police services with the most contact with the SIU - continues to abide by the SIU's operational definition of serious injury as do, I believe, the majority of police services.

Beyond the issue of the definition of "serious injury", some police services have also questioned the SIU invoking its mandate when it has chosen to investigate incidents that are perceived to have nothing to do with police conduct and the Criminal Code. One example given was that of an attempted suicide in a residence while the police were at the front door. Another was a motor vehicle collision said to have occurred six kilometers away from where the police had given up the pursuit. At least one police service actually questioned whether the SIU should ever be called when a chief or the chief's designate has concluded there is no criminality. The situation where a police dog "accidentally bit" a complainant was cited as an example.

Community groups, when informed of these incidents, asked how the SIU could possibly be aware of the actual circumstances, unless at least a preliminary investigation was conducted by it. They emphasized that in all of these examples, there was a potential issue of criminal negligence in relation to a death or serious injury and that it must be the responsibility of the SIU to decide when to invoke its mandate. Communities saw these situations involving a conflict of

interest for the police to be allowed to decide if the jurisdiction of the SIU was to be engaged. They also worried about the attendant delay in controlling the incident scene where a police service concludes the SIU lacks jurisdiction and does not notify, but the SIU ultimately decides it should have been notified. Indeed, communities were concerned that no one seems to have been disciplined for failing to notify the SIU in a timely manner which had obviously occurred in the dog bite example.

In my original report, I noted there was broad agreement that the SIU should be notified immediately whenever its jurisdiction is *reasonably suspected* to have been engaged. I also noted that it was not practical for a police service to attempt to determine the SIU's jurisdiction in a strict legal sense before notification is effected because of the inherent uncertainty (and subjectivity) of many incidents. In continuing to approach the issue as one of strict jurisdiction, any police service runs the serious risk of having its actions perceived as a rejection of civilian oversight and a violation of the duty to cooperate as expressed in the Regulation. The community will have more confidence in the SIU deciding not to get involved than if that decision is made for it by the very police service involved or associated with an event.

The SIU's mandate is investigatorial and, surely like an administrative tribunal, it has the jurisdiction to initially decide if its jurisdiction has been or should be activated. It can only exercise that jurisdiction if chiefs of police take a deferential gate-keeper approach and immediately notify the SIU when there is a reasonable basis or "air of reality" for doing so. The courts have referred to similar roles as a "screening function". A screening function does not involve the weighing of evidence to determine its ultimate reliability. What is envisaged is an objective determination of whether there is reasonable basis in the circumstances for proceeding to the next stage.[21] Part of those circumstances is the recognition

[21] For a similar approach quite close to home for chiefs of police, see *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)*, [2002] O.J. No. 3737 (Ont.

that any delay may impair the integrity of an investigation such as the failure to segregate involved police officers. In short, the community's confidence is part of the context. Thus, this contextual approach makes it unwise for the police community to undertake "trial judge" determinations on whether there is in fact a serious injury or a Criminal Code violation. Indeed, a contextual approach helps explain why the test of notification in the Regulation is one of reasonableness particularly where the Director's power to lay informations found in s. 113(7) of the *Police Services Act* makes no specific reference to serious injury. In other words, an "absence of jurisdiction" could never likely defeat the laying of an information by the Director.

The OACP Guidelines, with a definition different than the one originally negotiated, has created unnecessary confusion. Moreover, the OACP phrase "acute medical care" – presumably a medical term - has produced less clarity for the lay persons who must apply it and will only lead to more troubling delay in notification as physicians are consulted. Indeed, even if one accepts that hospital admission practices are changing to cause an altering of the SIU's jurisdiction under the Osler definition, the changes cut both ways. Today, serious medical interventions can occur without hospital admission just as patients can be admitted for extensive observation to determine the extent of injuries. Accordingly, the new tests of the OACP are unlikely to improve matters. I appreciate that the OACP believes the SIU is not giving due emphasis to the adjective "serious" as it is obligated to do. Unfortunately, I was not given helpful examples of where this has been the case. The dog bite incident could reasonably be seen to involve a serious injury and potential criminal negligence. Most were cases where doubt surrounded the SIU's jurisdiction and, after conducting its initial review, the SIU discontinued the investigation. The parties need to cooperate more on incident reviews and the SIU should consider the

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C.A.). See also *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, *Jackman v. Newfoundland Dental Board* (1989), 39 Admin. L.R. 154 (Nfld. S.C. (T.D.)) and W.J. Manuel & C. Donszelmann, *Law of Administrative Investigations and Prosecutions* (Aurora, Ont.: Canada Law Book, 1999) at 369.

public documentation of situations where it declines to further investigate in order to provide better guidance on what is and is not considered to be "serious". I understand the SIU is willing to work with all parties on both counts.

Recommendation 5:
Public notification of the SIU is to be made readily accessible.

This recommendation has been implemented. The SIU's 1-800 number is now in telephone books throughout the province and in a bilingual format. The SIU has also launched an improved website containing information on the Unit's history and manner of operation, press releases and a virtual tour of its facilities. Where notification is from a non-police source, the chief of the involved police service is immediately notified before any investigative steps are taken.

Accessibility to the SIU will need to be an ongoing effort for the Unit. More than a telephone number and a website may be necessary. Some community groups have suggested that the SIU's profile needs raising and proposed that information on the SIU also be posted in community centers, that pamphlets be distributed to those centers and that community representatives located there be given some basic education about the SIU and when to contact it. This is particularly important in northern communities where community centers provide vital communications links with more remote locations and are likely to be the point of first contact for a potential complainant.

The SIU's annual report, its steps since 1999 to establish a visible corporate identity and its thoughtful media relations have all contributed to the SIU being recognized by the public as a reliable public institution.

Recommendation 6:

The regulation should provide for securing of the incident scene in a detail consistent with usual police practices for serious incidents and be capable of enforcement.

This recommendation has been implemented in s. 4 of the Regulation which requires that the chief of police secure the scene in a manner consistent with police practice for serious incidents. Since the implementation of the recommendation, there does not appear to have been any difficulties in regard to the security of the scenes similar to the ones referred to in my earlier report (e.g. the permitting by the police of unauthorized persons to be at the incident scene).

The obvious exception to this positive commentary is where "jurisdictional" issues have arisen and the incident is not reported. In such circumstances, the scene may not be secured at all. This type of situation has arisen even in respect of those incidents where an individual has been taken to a hospital by the police and, in some cases, admitted for observation. Taking the position that they were not certain of the true nature of the injury and were working on the presumption that the injury was not serious, the police have reported late if they have reported at all. As explained under Recommendation 4, the OACP definition of "serious injury" specifically excludes admission to hospital for observation. Unfortunately, this approach, should the injury prove itself even to the police as serious, can leave the incident scene unsecured and the officers unsegregated in the meantime. The result is inconsistent with the purpose of notification as set out in the Regulation and with fostering public confidence in our police services.

Recommendation 7:

The regulation should make clear that the SIU has the lead investigatory role in gathering evidence and interviewing witnesses.

Section 5 of the Regulation implemented this recommendation. Although there have been a few incidents where the authority of the SIU as the lead investigation agency has been challenged in areas such as its authority to designate officers and its ability to enter an incident scene, these difficulties, for the most part, have been the result of a lack of experience with the Regulation and have been remedied on a case-by-case basis.

The SIU says it has attempted to facilitate effective working relations between it and the police in respect of incidents that give rise to parallel investigative interests through the adoption of several Operations Orders. Operations Order 003 purports to be a formal recognition of the investigative interests of the police in respect of incidents that have triggered the SIU's mandate. It is principally directed to those cases where the parallel interest involves a police criminal investigation. Operations Order 005 is intended to address SIU-police cooperation in the context of police administrative investigations under s. 11 of the Regulation. Operations Order 013 deals with the issue of the seizure of police equipment.

The police have challenged the issuance of these orders without prior consultation. The SIU responds that it needed to move quickly on getting its house in order; that it is autonomous; and that it has been wary of endless and hostile debate. One of the primary concerns of the police services is that the SIU orders limit the sharing of information with the police service. Chiefs of police argue that evidence gathered by the SIU that could assist the police in its parallel criminal investigation or in a chief's s. 11 administrative investigation are routinely denied to them.

The SIU maintains that among the imperatives critical to the Unit's success is its general policy of "confidentiality without consent" which it applies in respect of witness statements and other evidence. According to the SIU, the objective of the policy is to foster cooperation of witnesses in SIU investigations by ensuring

that the information they provide will be maintained in confidence if that is their wish. It is believed that without such assurances certain witnesses, particularly those who stand in jeopardy in relation to a separate police investigation, are less likely to come forward and provide information to the SIU.

The police services submit that requests made to the SIU from parties engaged in legal proceedings sometimes result in the disclosure to those parties of the very evidence that is denied the police. This usually arises in criminal proceedings initiated by the police relating to incidents that were investigated by the SIU. In those cases either the prosecuting Crown counsel or defence counsel could request the SIU's file on the basis of the disclosure obligations recognized in *R. v. Stinchcombe*.[22] The legal proceeding might also be a civil action against the SIU resulting from an incident that was investigated by the Unit. In still other cases, the SIU is served with subpoenas from parties to civil or criminal proceedings seeking production of SIU files related to witnesses that may have been involved previously in SIU investigations and who are witnesses in the proceeding in question.

The SIU has stated that in sharing information with the police it must not be enlisted, nor be perceived to have been enlisted, in the incrimination of the witnesses that it has interviewed. This is especially true of those witnesses whose injuries are being investigated. The SIU maintains that on every occasion when it is asked for information, it reviews those requests with a view to ascertaining which materials, if any, may be produced to the requesting party without violating the interests that underlie its confidentiality policy. Where the production of certain materials would undermine the interests underlying the policy, the SIU asserts a privilege in the material and declines to produce it. In *R. v. Tomlinson*[23], for example, the SIU was accorded third party status in this type

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[22] [1991] 3 S.C.R. 326 [hereafter *Stinchcombe*].

[23] (1998), 16 C.R. (5th) 333, [1998] O.J. No. 1596 (Ont. C.J. (Prov. Div.)). The SIU was accorded third party status, triggering the application of *R. v. O'Connor*, [1995] 4 S.C.R. 411, (1995), 103 C.C.C. (3d) 1 not *Stinchcombe,ib id*.

of situation. The SIU's denial is normally given in the context of a request by the prosecuting Crown and/or police for a statement of an SIU witness who stands charged with a criminal offence relating to an incident investigated by the SIU. The SIU advises, that as a practical matter, police services are given the names of all witnesses and the civilian witnesses usually do not request confidentiality. While police officers designated as witnesses usually do require confidentiality, chiefs of police have the power to direct a s. 11 administrative interview with any police officer – whether a subject or a witness officer - where he or she must speak or face discipline. Obviously, it might be convenient or tactically useful for the chiefs to have an officer's SIU statement in conducting that interview. However, the competing interest of the SIU in securing cooperation with its investigations also has to be considered.

Police services have raised concerns regarding the SIU's interaction with the Office of the Chief Coroner and specifically where police officers are prevented from attending autopsies on certain occasions. The police believe that the SIU is responsible for this denial. However, the decision regarding attendance at autopsies is that of a coroner and it is the position of the Chief Coroner that only those with a real investigative interest in a death and without any apparent conflict of interest will be granted access. It is reassuring to see that on this issue, the SIU, the Office of the Chief Coroner and the OACP are working together to develop effective protocols to resolve any conflict. For example, a protocol for determining the location of the post-mortem, attendance at the post-mortem and the sharing of information has been implemented.

It might also help to include the SIU in sections of the *Coroners Act*[24] as an organization providing assistance to a coroner and, thereby, better institutionalize its role. But the lack of reference to either the Unit or a peace officer[25] has not proved an impediment to date. The Office of the Chief Coroner is aware of the

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[24] R.S.O. 1990, c. C.37.
[25] An SIU investigator has the status of a peace officer. See *Police Services Act*, s. 113(4).

sensitivity of SIU investigations and the needs of all stakeholder groups. It is recognized that the SIU is the lead investigatory body; that it has need for information about the cause and manner of death as quickly as possible; and that the community's confidence in the SIU and policing are at stake.

Recommendation 8:

The regulation should provide that all involved officers (subject and witness officers) shall be segregated from each other to the extent that this is practicable and prohibit the discussion of the incident with each other until they are interviewed by the SIU.

This recommendation has been implemented through s. 6 of the Regulation. The recommendation was made in the earlier report in response to the concern that segregation of involved officers was necessary to maintain the integrity of an SIU investigation. The recommendation also recognized that, in remote locations, the investigation may have to accommodate the inherent delay associated with the SIU's attendance, and the segregation of officers from each other may not be practical. The Regulation, therefore, proscribes any discussion of the incident between involved officers until they are each interviewed by the SIU.

It was reported by the SIU that officers have frequently gone off duty, some with claims of stress related injury, and their counsel are often unavailable immediately. It has also been reported that at least one police association lawyer took the position, without objection by police supervisors, that this provision in the Regulation could not be used as a basis for requiring officers to remain at the scene or at the detachment until the SIU arrives. In cases where officers do stay on duty and remain physically segregated, the SIU has sometimes encountered one lawyer acting for multiple witness officers and, surprisingly, even including subject officers. Given the ethical obligation of disclosure of a lawyer to his or her client, this practice can undermine the purpose of segregating the officers and clearly needs review.

Any of these practices can offend both the spirit and the law of civilian oversight. Thankfully, they do not appear widespread and, of course, chiefs of police have a duty to monitor and deal with any abuse. If they do not, the Director of the SIU has access to important sanctions.

I was advised by several police lawyers that the SIU was seldom ready or willing to immediately interview involved police officers, preferring first to analyze what has happened from other sources. Police associations have stated that the retention of a single lawyer to represent witness officers is an attempt to save money. But this commendable sensitivity cannot defeat the legal requirement of segregating officers. Importantly, police services have advised that they are working at developing procedures to ensure that their officers remain in compliance with the Regulation. For example, compliance has also required police services to depart from the common practice of group debriefings immediately following tactical team operations. Some police services have expressed significant concern over this issue, but appear to be developing practices to comply. Professional working relationships, I am satisfied, will be able to resolve these issues and chiefs of police must be vigilant in responding to SIU concerns.

Recommendation 9:

The current subject/witness officer distinction should be preserved. The regulation will define subject and witness officers in current terms and provide that the SIU's assessment of who is a subject and who is a witness officer shall govern in any given case. Designated subject officers will not be compelled to submit to an SIU interview. Officers designated by the SIU as witness officers will be so obligated.

This recommendation has been implemented through several provisions of the Regulation. The definition of "witness officers", however, differs from the

definition set out in the former SIU Standard Operating Procedure. The former procedure described witness officers as officers who are in a position to provide information about an occurrence being investigated while the Regulation defines them to be those officers involved in the incident under investigation. Surprisingly, this difference has apparently generated some debate as to who are witness officers and has been relied on by some police organizations to contest the SIU's designation authority. Such narrow parsing of the Regulation does not inspire community confidence and gives no scope to the requirement that such decisions are based on "the opinion of the SIU Director". Indeed, it is reasonable to think that the subject/witness officer designations do not exhaust those whose duty it is to cooperate. For example, there could be tertiary officers, like supervisors, who would not be involved in an incident, but with whom the SIU could reasonably want to confer.

The SIU has further reported that some police organizations have wrongly attempted to assert authority over the designation process. Declaring who is a subject or witness officer is the exclusive duty of the SIU. Problems relating to the designation process have also arisen when police services have adopted unduly restrictive and technical interpretations of the Regulation. For example, the SIU has been confronted on several occasions with police services that initially declined to provide the SIU with any information about an incident they reported, including the names of the involved officers, aside from the fact that an incident engaging the SIU's jurisdiction had occurred. The approach obviously delays an investigation. Fortunately, these situations are in the minority and have been resolved by the responsible chief or by the SIU pursuing or threatening to pursue a complaint. The Regulation is not exhaustive of the statutory duty to cooperate and police services continue to be under a general statutory duty to comply with all reasonable requests made by the SIU in the course of an investigation such as the provision of basic incident information at the scene.

Community groups when advised of such initial refusals have expressed the view that the subject/witness officer distinction should be eliminated. They noted that they only reluctantly agreed to formalizing the distinction in the original consultation and that the continuing challenges to the SIU's authority serve to compromise the integrity of its investigations. On the other hand, police associations have submitted that the designations are working and should not be changed. While more visible monitoring of compliance by chiefs of police is necessary, abuses are the exception and this aspect of the Regulation has very much facilitated SIU investigations.

Another issue that has been raised by the SIU and police groups is the issue of the treatment of individuals who are connected in some way to the provision of policing services and involved in an SIU investigation, but do not fall under the definition of a "police officer" in the *Police Services Act* or the Regulation. It is a "police officer" the SIU investigates under the Act and designates as either a subject or witness officer under the Regulation. Officers from other provinces and the Royal Canadian Mounted Police now often train with their Ontario counterparts. First Nations constables also provide substantial policing services in Ontario. Civilians now play a significant role in the provision of police services. While civilians are members of a police force and "members" have a duty to cooperate under s. 113(9) of the Act, the Regulation does not refer to civilian members of a police force.

The SIU's response to this gap has been to emphasize that all those who have a duty to cooperate and stand in a position similar to that of "witness officers" must cooperate with the SIU. The SIU Director has also undertaken that the Unit would not press for the cooperation of those in this group of non-police officers who occupy positions akin to "subject officers." The express undertaking to treat these non-police officers as if they were "subject" or "witness" officers under the Regulation with all the same rights and protections, and a reciprocal agreement on the part of the Ministry of the Attorney General to do the same in relation to its

Directive to Crown prosecutors, have facilitated the cooperation of non-police officers. This framework, referred to as "analogous treatment", has been formalized in SIU Operations Order 001. Unfortunately, at least one police service has questioned analogous treatment notwithstanding that, without it, all civilian members might be ordered to cooperate by a chief of police with any failure to do so met with immediate employment consequences.

Anomalously, civilian members of the OPP stand in a position that is distinctly different from civilian members of municipal police services. They, in fact, are specifically excluded from the definition of a member of a police service in the *Police Services Act*. The reason for this exclusion is not entirely clear, but it is speculated that it results from their former membership in the Ontario Public Service and Employees Union. It has been argued that the effect of the definition is that there is no obligation for these individuals to cooperate with an SIU investigation. This is the position taken by the OPP and the OPPA. However, it can just as reasonably be argued that the OPP, as employer with its own duty to cooperate, can and must require the cooperation of its own civilian employees. Analogous treatment is a pragmatic response by the SIU. One would expect an equally pragmatic response from a police community concerned about community confidence.

However, it is probably best not to leave these important obligations to debate. Civilian employees should be obligated to cooperate but should also be accorded the same protections of the Regulation as accorded to police officers. There is no objection to making clear the responsibilities of OPP civilian employees and those of other services. It is a reality that aspects of what we think of as traditional policing are increasingly becoming the work of civilians employed by police services. Communication centres and the booking, monitoring, transport and feeding of detainees in police cells all illustrate this tendency.

In respect of First Nations officers and Special Constables, the Crown and the SIU have similarly joined in an undertaking for analogous treatment for all purposes. Some chiefs of police have argued that First Nations officers and Special Constables should not be treated any differently from police officers and that the legislation must be changed to remedy this disparity. Others, however, have been concerned about any possible implications for First Nations and Aboriginal self-government. Consultation with the Union of Ontario Indians might be a useful step in bringing more consistency to this important area of Aboriginal policing. Based on my discussions with the Nishnawbe Aski Nation, for example, I would be surprised to learn this issue of coverage cannot be satisfactorily resolved. In the case of non-Ontario members of police services, such as the RCMP, discussion with the appropriate senior official has, to date, proven effective in securing cooperation. A protocol between the SIU and the RCMP to formalize this process of cooperation is currently in contemplation between the respective organizations.

Recommendation 10:

The Attorney General should direct Crown counsel by means of a Crown policy that a police officer's statement obtained by the SIU in a compelled interview is an involuntary statement. In light of this fact and requirements of the *Charter*, the policy shall provide that neither the statement nor any evidence that would not have been found but for the statement will be used to incriminate the officer in any subsequent criminal proceeding. The policy should also recognize that the statement cannot be used for the purpose of impeaching credibility, but these immunities would not apply in any prosecution concerning the intentional giving of a false statement.

This recommendation has been implemented by means of a Directive issued on December 23, 1998 by the Attorney General. The SIU reports that, since January 1, 1999, the matter of a compelled statement from a subject officer (an officer who had been previously designated as a "witness officer" at the time of

the making of the compelled statement) being even considered for use against the officer has not become an issue in any case where charges have been laid.

To avoid the issues inherent in "witness to subject redesignations" arising, whether charges have been laid or not, the SIU has, out of an abundance of caution, initially given preference to designating an officer as a subject officer, if there is any doubt as to his or her role. While this process has resulted in a number of "subject to witness redesignations", it has to date confined "witness to subject redesignations" to a very few cases. The SIU reports that this has only occurred in 7 out of 617 cases and out of at least 3085 designations since January 1, 1999. To safeguard the designation process, by practice, redesignations must be authorized by an Investigative Supervisor, the Executive Officer or the Director.

The police, however, have complained about the SIU's preference for subject officer designations and subsequent redesignations. Such a practice has attracted the criticism from the police who allege the designation is used to simply cause upset to a particular officer. To address even this concern, the SIU has adopted a practice of "standing aside" officers to whom uncertainty attaches until the matter can be resolved. This alternate practice has generally been preferred to an uncertain subject officer designation.

A number of issues have also arisen concerning the Directive. The Directive's reference to statements received in a police chief's administrative inquiry is not qualified by a reference to the statements of the charged officer and this has attracted criticism that the Directive is unnecessarily broad. By merely referring to a police officer's statements, it is worried that the Directive might be construed to prohibit the use of a police officer's statement in a subsequent criminal proceeding, even where that proceeding is not against the statement giver. It has been submitted that this part of the Directive needs to be clarified. It has

also been noted that the word "compelled" in the Directive is not defined and that the word would best be defined.

Recommendation 11:

The regulation should stipulate that an officer is entitled to representation by legal counsel and/or a police association, provided the availability of such advisors will not lead to an unwarranted delay.

This recommendation has been implemented in s. 7 of the Regulation. Every police officer is entitled to have legal counsel or an association representative present during his or her interview. The SIU Director has the power to waive this right, if waiting for representation would cause an unreasonable delay. As the issues pertaining to representation by legal counsel have been discussed elsewhere (in particular Recommendations 4, 8 and 12), they will not be repeated here with one exception. Community representatives argued that, on the surface, this change is now relied on by the OACP to put their own 1991 definition of "serious injury" in dispute. They submitted that if payment for representation rights has become integral to police officer acceptance of the duty to cooperate, those costs have also become essential to civilian oversight.

Recommendation 12:

The regulation should provide that interviews of witness officers are to be generally forthwith at the request of the SIU, but also allow for the possibility of delay where appropriate grounds exist. An unjustified failure to comply with an SIU interview request should be treated as a serious act of misconduct.

This recommendation has been implemented in s. 8 of the Regulation. The section provides that a witness officer shall immediately upon being requested to be interviewed by the SIU, and no later than 24 hours after the request where there are appropriate grounds for delay, meet with the SIU and answer all its

questions. The interview request must be made in person, but the SIU Director may waive the time requirement.

The SIU reports that arranging witness officer interviews in a timely fashion continues to be a difficult matter. As discussed earlier, where little or no, and sometimes contradictory information regarding the roles of various officers is provided by the police service at the outset, the designation of officers and resulting interviews must be delayed by the SIU. Also, incidents of officers being released from duty or simply going off duty on sick leave as a result of alleged stress have made it difficult for the SIU to interview them. Troubling also is when a police service takes the view that contact information of officers is personal information and refuses to provide this information to the SIU. Interviews can also be delayed by the witness officers insisting on the right to representation and the unavailability of the counsel of their choice. As a consequence, the SIU has resorted to adopting a procedure, agreed to by the police services and associations, whereby designation letters are delivered to the chief's designate for service on the officers in question. Upon service, efforts to arrange an interview are undertaken. This procedure, of course, does not avoid the delay that has already resulted.

Although investigative standards do not require every witness to be interviewed immediately and most issues that have arisen have been generally resolved through discussion, it appears that the SIU, in a growing number of cases, has had to threaten the initiation of a complaint and/or of the waiving of the right to counsel to obtain timely interviews. In one instance, a lawyer for a police association has actually insisted that witness officers may be interviewed by the SIU only after 24 hours notice. However, in this case, the police service has stated that it is attempting to resolve this misunderstanding of the Regulation with that police association's lawyer.

Community reaction was directed at chiefs of police. Community leaders asked how they could rely on chiefs to enforce the duty to cooperate when they will not censure officers who intentionally delay interviews or, worse, actively support them. Several community groups believe public prosecutions under the *Provincial Offences Act*[26] would provide a better sanction. They also worry that compliance seems increasingly to be at the convenience of police whereas the Regulation sets strict time lines and gives real power to the Director to enforce them.

This is probably not the time to give up on the chiefs' role in enforcing the duty to cooperate. I believe the existing problems on cooperation can be overcome within the current framework. However, these issues are serious. They demand an immediate and committed effort by the chiefs of police and the SIU in addressing them.

Recommendation 13:

Regulations should provide for oral interviews to be recorded manually. A copy or transcript of the interview must be provided to the officer following the interview on appropriate conditions.

Section 8 of the Regulation has given effect to this recommendation. The obvious delays related to the manual recording of interviews appear to have led to many informal agreements between the SIU and the police to completely abandon this method of recording in favour of interviews recorded on audiotape and videotape. Delays associated with manual recording now appear to be used as leverage or a bargaining tool by both the SIU and the police to negotiate solutions to other disagreements that may arise from an investigation. This issue, however, can contribute to excessive legal costs where manual transcription is insisted upon, because it can be the difference between a one-hour and a six-hour lawyer's charge. The manual approach was recommended

[26] R.S.O. 1990, c. P.33.

as an introductory step. Therefore, to bring this area into line with judicial admonitions,[27] appropriate technological recording should be required and cannot be seriously resisted by anyone.

Recommendation 14:

The regulation should confirm that witness officers must complete their notebooks in full as currently required and police services must provide such notebooks to the SIU forthwith upon request, but subject to the same procedures and Crown policy applicable to their oral statements. Subject officers shall also continue to be required to complete their notebooks in full and to provide them to their police services, but they shall not be provided to the SIU. Subject officers, by a Crown policy, will also be assured that their notebook accounts and any evidence that would not have been found but for their notebook accounts will not be used to incriminate the officers in any subsequent criminal proceeding. The policy should also recognize that the statement cannot be used for the purpose of impeaching credibility, but the immunity would not apply in any proceeding concerning the giving of a false statement.

This recommendation was implemented by s. 9 of the Regulation and the Attorney General's Directive of December 23, 1998 to Crown prosecutors. It is apparent that s. 9 and the corresponding protections contained in the Directive have greatly improved the ability of the SIU to secure witness officers' notebook entries related to an incident in a prompt fashion. A few difficulties, however, remain.

Where the status of involved officers is not immediately apparent, the requirement in s. 10 of the Regulation for officers to be notified of their status as "witness officers" before a request can be made by the SIU for an interview or a

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[27] See *R. v. Lim*, [1990] O.J. No. 940 (Ont. S.C.) and *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737, [2001] O.J. No. 4646 (Ont. C.A.).

copy of their notes leads to delay. This is especially problematic in those instances where police services decline to provide the SIU with even basic information regarding the identities and roles of officers involved in an incident. The SIU reported that there have been some occasions where officers once designated have failed to complete their notes promptly after an incident in compliance with their duty as a result of alleged stress.[28] In some cases, officers have received legal advice to refrain from completing their notes until they have consulted with their lawyers. This is very problematic. It has also been noted that there is a lack of consistency amongst police services on the requirement of the completion of notes at the end of each shift.

There also appears to some confusion surrounding the terms "notebooks", "notes" and "reports" as they are used in my 1998 report, the Regulation and the Attorney General's Directive. My report uses the terms "notebooks" or "notebook entries", while section 9 of the Regulation uses the language of "notes." The Attorney General's Directive extends the evidentiary immunities set out in it to "notes and reports". Instead of seeing all this as the result of drafting conventions where broadly synonymous words are used, some police services have taken the overly technical view that "notes" as used in the Regulation extends beyond mere "notebooks" and captures a wide range of police records. Others have taken the view that all records created by or containing information of subject officers, regardless as to when such records were made, are exempt from disclosure to the SIU under the terms of the Regulation. This latter view has even been used to support not providing the SIU with a police dog's training and service record because many of the entries were made by the subject officer who was also the dog's handler.

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[28] The increasing reliance on stress by police officers for not being available to SIU investigators, while civilians who were involved in the same incident are required and willing to be available for immediate questioning, can undermine public confidence. Chiefs of police must be vigilant in reviewing the *bona fides* of such claims.

In response, the SIU has expressed its position that "notes" in the Regulation means "notebooks" or "notebook entries." Crown counsel is also concerned that the term "notes" has been contended at times to extend to materials prepared before the incident. Thus, if the officer had contact with the complainant on a prior date and had prepared written materials, the police service might take the position that those are the officer's "notes" and not turn them over.

Many of these concerns, however, are theoretical in nature. There is, therefore, the danger of trying to answer hypothetical questions without the benefit of actual facts and reasoned argument. Many issues are also now being formally explored in discussions between the SIU and the OACP where progress is being made. While the Charter is ever present and privacy legislation cannot be ignored, no one should be interested in uncertain legal contests when voluntary compliance within these laws is obviously possible and the needed confidence of racialized communities is considered. These matters and any changing practices in the way in which police officers record their activities should be easily accommodated within the purpose of the existing legal framework and, in particular, the words used.

Recommendation 15:

The regulation should require a chief of police to conduct an administrative inquiry forthwith into any incident involving the SIU, subject to the SIU's lead role in gathering evidence and interviewing witnesses. The chief of police shall make a report of all findings and actions taken and/or recommended to the police services board no later than 30 days following the issuance of the SIU report. The regulation will confirm that all involved officers must cooperate forthwith with this internal investigation subject to the existence of a Crown policy directing Crown counsel that a police officer's statement obtained in a compelled administrative or disciplinary interview is an involuntary statement. In light of this fact and the requirements of the *Charter*, the policy will provide that the statement and

any evidence that would not have been found but for that statement will not be used to incriminate the officer in any subsequent criminal proceeding. The policy should also recognize the statement cannot be used for the purposes of impeaching credibility, but these immunities would not apply in any prosecution concerning the intentional giving of a false statement.

This recommendation has been implemented in s. 11 of the Regulation, which requires the chief of police to conduct an investigation to "review the policies of or services provided by the police force and the conduct of its police officers." The prohibition on the use of compelled statements produced in the course of the chiefs' investigations was addressed in the Attorney General's Directive. This Directive has been discussed above and the concerns with it being overly broad reviewed.

As reviewed under Recommendation 7, the SIU adopted a policy of active cooperation with s. 11 investigations to the extent possible without compromising SIU operational imperatives. This policy is articulated in SIU Operations Order 004. However, as was pointed out earlier, police services have argued that evidence gathered by the SIU that could assist in a parallel criminal investigation or in a chief's s. 11 administrative investigation is frequently denied to them. They also complained that the Office of the Chief Coroner has not granted them access to autopsies in certain circumstances. Particular examples of real barriers to effective s. 11 investigations were not tendered. The concerns were more those of convenience and achieving a tactical advantage.

Cooperation between the SIU and police services has been further complicated by the fact that the SIU Director appears to report to the Attorney General even in cases where the Director has laid charges. Where a report is made to the Attorney General, chiefs of police must complete a s. 11 investigation within 30 days of the Director reporting to the Attorney General. But proceeding with a s. 11 investigation when criminal charges are being pursued could have an adverse

impact on the criminal trial. My original recommendation was based on the assumption that the SIU Director did not report to the Attorney General when charges had been laid and the partnering belief that police services would, in the ordinary course, conduct an administrative investigation following a criminal trial. Chiefs of police also advised that s. 11 investigations are now immediately performed as a matter of course in all cases. Clearly, better sequencing of s. 11 investigations need to be reviewed and the SIU should consider whether it must report to the Attorney General where charges have been laid.

Chiefs of police have reported that the results of s. 11 investigations have led to positive changes in the policies of police services and in training. They have also led to the discipline of police officers. Unfortunately, police services boards are not making the s. 11 reports of chiefs of police available to the public notwithstanding that it is expressly permitted by the Regulation. Accordingly, community groups questioned whether chiefs of police were taking their s. 11 reviews seriously. For example, I was asked whether there have been any disciplinary proceedings commenced as a result of these investigations and, in particular, arising out of an alleged failure to cooperate. It would enhance public confidence if police services boards would commit to more transparency in this respect. Privacy concerns can be dealt with by judicious editing. I also note that the SIU, in its media releases, sometimes suggests areas for chiefs of police to review and ready acceptance of chiefs of police to do so has been well received by affected communities.[29] The duty to cooperate should be one perspective reported on in every administrative review.

Recommendation 16:

The written report of the SIU should be made public where no charges are laid. If need be, the *Police Services Act* should be amended to provide for

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[29] See, for example, SIU, News Release, "SIU Concludes Investigation into Fatal Kemptville Collision" (9 December 2002).

its release notwithstanding the *Freedom of Information and Protection of Privacy Act.*

This recommendation was not implemented. In my previous report, I stated that there was broad agreement among the parties that the SIU Director's report to the Attorney General should be made public (assuming no charges are laid) and that a public report was central to providing the necessary accountability and community confidence. It was also suggested that concerns about personal information might be accommodated by the appropriate editing of the written report prior to release. I understand that after the original recommendation was made, some parties expressed reservations with the proposal and that barriers arose due to the perceived need for legislative amendments to the *Freedom of Information and Protection of Privacy Act*[30] and *Municipal Freedom of Information and Protection of Privacy Act.*[31] However, I must report that the parties have again agreed that the issue be reviewed. Nonetheless, it must be acknowledged that it is not our practice to publicly release police investigation results.[32] There may also be the concern for how such SIU information might be used or received given the civil litigation that often surrounds incidents attracting SIU involvement. The SIU is also troubled over how release of its report would impact on its perceived need for confidentiality in obtaining the cooperation of certain witnesses. Nevertheless, both the police and community groups see value in the Director's report being available to the public when no charges are laid against a police officer. Many in an affected community will want to know why and police services believe the reports can clear the air in respect of their involvement. While community groups recognize the competing concern of the SIU's confidentiality policy, they trust that appropriate editing could accommodate this interest while still achieving the public interest in disclosure.

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[30] *Supra*, note 14.
[31] *Ibid.* See, for example, *London Police Services Board* (18 January 1996), Order M-593 (I.P.C.)
[32] Privacy interests presumptively militate against disclosure of personal information compiled as part of a police investigation. See s. 14(3)(b) of the *Municipal Freedom of Information and Protection of Privacy Act,s upra* note 14.

Under the current legislative framework, the SIU has significantly helped to close any "information gap" by issuing detailed media releases at the conclusion of non-charge investigations[33] and by personally debriefing injured persons and, in the case of death investigations, affected families. Debriefings are also available to officers and police services. Where the level of media attention has been particularly significant in respect of an incident, the SIU's Director has participated appropriately in press conferences held in the affected communities. As previously noted, the SIU has also instituted an "external case review" program. This is a voluntary process by which the involved police service is invited to discuss all aspects of, and concerns related to, an investigation. This approach appears to be an important innovation in police service/SIU dialogue.

Community groups have expressed the desire for the SIU Director to have the authority to comment and make recommendations to police services regarding various police service policies that, in his opinion, could lead to improvements in policing, police training and other issues of professional standards. Police groups and the Office of the Chief Coroner have, however, cautioned against such a formal expansion of the Director's already challenging mandate. The police community has stated that issues related to professional standards and police training fall within the jurisdiction of chiefs of police where there is great expertise. The Office of the Chief Coroner also noted that the SIU's mandate to make determinations solely regarding criminal liability may impede its ability to gather all the pertinent facts for informed comments and recommendations on other policing matters. Obviously, the SIU has acquired from its investigations understanding and expertise in policing practices. However, the caveats raised with me are not without merit. The approach of more informal suggestions to the police of areas for possible review sometimes made by the SIU in its concluding media statements is probably a good compromise.[34]

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[33] See *supra* note 29.
[34] See *supra* note 29.

Recommendation 17:

Following the occurrence of an incident, a police service shall only advise the public that the SIU is involved. The SIU will be responsible for all public communications concerning the investigation. SIU public statements about an incident during an investigation will be aimed at preserving the integrity of the investigation.

This recommendation was implemented in sections 12 and 13 of the Regulation, which are directed at police services and the SIU, respectively. The restriction regarding public communications stems from the history of inappropriate comments made during the course of SIU investigations. The Regulation has worked. The situation has improved immeasurably. All stakeholder groups have now generally accepted this rule, including the SIU. The SIU and the police services have worked cooperatively on approaches to police communications aimed at preserving the integrity of a SIU investigation while meeting the needs of an affected police service and the public's right to information. Reference can be made to the SIU's Operations Order 015 governing news media releases and the SIU Director's 1999 letter to all chiefs of police.

Recommendation 18:

Increased resources for the SIU should provide for more substantial initial and ongoing training of investigators including independent peer review of its investigatory practices.

In 1998, ongoing training of SIU investigators was particularly important to both police and community groups. It is now widely recognized by both community and police groups that the competence, the training and the professionalism of SIU investigators have significantly improved. The SIU reported that since January 1, 1999 there has been almost a complete turnover of the members of the Unit (over 95% of its staff) and that training has been aggressively pursued. One of the first steps taken in the renewal of the Unit was to hire a full-time

Training Coordinator. The role of the Training Coordinator is to assess, in accordance with standards established by senior investigative staff, the training requirements of each member of the Unit and to implement the required training, whether through programs or courses organized within the Unit or at an external institution.

The Training Coordinator is also responsible for managing the newly developed annual performance assessment program out of which further training requirements are identified. The position of the Training Coordinator is a major innovation at the SIU and has institutionalized ongoing training and, thus, continuous improvement. Approximately nine percent of the SIU's total budget is devoted to training.[35] The Unit filed information on the numbers of staff trained in particular subject matters and its training plan for the current fiscal year. The SIU takes the position that its training standards and the qualifications of its personnel are on an equivalent level with any police service in the province. However, it would be even more reassuring to learn an independent peer review mechanism, as recommended in my original report, had arrived at the same conclusion.

SIU investigators have taken advantage of many opportunities over the last three years to join other law enforcement professionals in investigation courses sponsored by various organizations such as the Ontario Police College. The SIU has itself hosted at its headquarters training programs administered by the Ontario Police College, such as the conduct of homicide investigations and major case management, as well as specialized programs imported from the United States. Since 1999, the SIU has implemented a new process for the selection of Unit staff. Its advertisements for investigative positions have attracted hundreds of applicants and each applicant has been vetted through background checks, practical tests of skills and interviews. The SIU reports that these efforts have resulted in an investigative staff complement with very high-quality experience in criminal investigations. Significantly, five of the Unit's ten full-time investigators

[35] See, for example, SIU, *Annual Report 2001-2002*, (Toronto: SIU, 2002) at 23-25.

now come from a non-police background as do three of the as-needed investigators.

Both police and community stakeholder groups confirm vast improvement in the SIU's core competencies.

Recommendation 19:
There should be cross-cultural education opportunities for SIU investigators and a commitment to recruit qualified investigators from more culturally and racially diverse backgrounds.

The original report noted that cross-cultural education was a particularly important concern for racialized community groups and, in particular, Aboriginal communities. As a result, it was recommended that appropriate cross-cultural training should be undertaken by SIU investigators and that there be a commitment to recruit from more culturally and racially diverse backgrounds. The SIU has admitted to having experienced difficulty with fulfilling this recommendation. In respect of recruiting qualified investigators with more culturally and racially diverse backgrounds, the Unit has been successful only to the point of hiring one investigator of ten full-time investigators with a First Nations heritage and one of 35 as-needed investigators with some First Nations antecedents. However, it was noted by the SIU that only one of ten full-time investigators is female as are only three of 35 as-needed investigators.[36] Other cultural groups are represented amongst the SIU's administrative staff. All of these individuals won competitions for their positions purely on a merit basis.

The SIU is beginning to discuss this issue of recruitment with community groups, the Director's Resource Committee and police communities. Therefore, efforts to attract meritorious candidates with greater cultural and racial diversity appear to

[36] I understand the point of this observation, but the underrepresentation of female investigators might also be a source of concern.

be continuing. A more concerted approach will likely have budgetary implications. The SIU has also stated that it will continue to ensure that investigative staff are sensitive to the various cultures with which they have contact. These efforts have included the involvement of appropriate speakers at the SIU's annual investigators' seminar. The African-Canadian community and other racialized groups, however, would like to see more institutionalized training efforts in these areas as the Unit has done with training generally.

In regard to Aboriginal communities, the SIU reported that the bulk of its experience is with First Nations people in off reserve situations given the growing independence of First Nations policing and the absence of jurisdiction over First Nations constables. To ensure that an appropriate process is followed both in respect of off reserve incidents and in those situations when the SIU wishes to go onto a reserve, the SIU developed Operations Order 017 in consultation with several First Nations chiefs of police. That Order formally recognizes the distinctive status of Aboriginal peoples in Canadian society and seeks to ensure an approach to SIU investigations involving Aboriginal persons that reflects respect for the realities that are uniquely Aboriginal. The SIU also has made efforts to involve the Unit's one First Nations investigator in any case involving First Nations people. This involvement included the SIU's participation in a healing circle when explaining the closure of an investigation regarding the death of a young native man to his mother and other family. However, more institutionalized training of all its investigators on Aboriginal culture would be desirable.

Recommendation 20:

The SIU should also establish channels for regular communication between itself and the Aboriginal communities of Ontario appropriate with the latter's unique status in Canadian society.

Grand Chief Stan Beardy of the Nishnawbe Aski Nation urged that the SIU conduct public awareness sessions in schools, community centres, and First Nations in the north to better inform community members what they can do when they come into conflict with police officers. For example, it was pointed out that a growing number of the 40,000 member Nishnawbe Aski Nation are moving off reserve to live in large urban centers such as Thunder Bay and Sudbury where they sometimes experience altercations with police officers. Community representatives from Kenora during the original consultation and some correspondence received during this review pointed to similar trends.

The SIU has explained that the establishment of regular channels of communication between the SIU and the Aboriginal communities has proven difficult owing largely to the diversity within and between these communities in Ontario, particularly at the political level where the SIU sees the need to be conscious of the existence of both band councils and chiefs of First Nations police services. Moreover, the trends referred to require government support and community-based dialogue. Notwithstanding these difficulties, however, the SIU has experienced progress on several outreach fronts and an approach to the Union of Ontario Indians might also prove helpful. As discussed under Recommendation 19, the SIU consulted with representatives of the First Nations policing community in Ontario to develop Operations Order 017. It has also created the SIU Director's Resource Committee which could offer representation to the urban Aboriginal community. This would be a representation additional to the separate dialogue envisaged by the recommendation. In November 2001, a member of the SIU spoke at one of the meetings of the Spirit of the People, a First Nations organization in Toronto that counsels troubled First Nations youth.

Recommendation 21:

The SIU, the police and community groups should meet on a regular basis to discuss general SIU-related matters. SIU resources should reflect this commitment.

In 1998, everyone who was consulted stated that it would be helpful for regular meetings to take place among interested parties. As the SIU's work necessitates contact with the police, the SIU deals frequently with police organizations such as the OACP, the OPP, the PAO, the OPPA and many other police associations. It is the SIU's perception that these organizations have preferred to meet with the SIU separately and the SIU denies that it disbanded a broad-based policing committee as charged by the PAO.

The working relationship between the various police organizations and the SIU varies considerably depending on the police organization. Although meetings may have been difficult to arrange five years ago, the SIU now meets regularly with the OACP. An OACP preference for speaking directly to the Attorney General instead has dissipated with the encouragement of the Attorney General. Importantly, the OACP's SIU Committee is no longer dominated by lawyers. The larger police associations show little reluctance in contacting the SIU Director whenever the need arises. The president of the OPPA has sat on two hiring panels for investigative supervisors along with a community representative. In contrast, the relationship between the SIU and the PAO, by both organizations' admission, needs improvement. They might benefit from a few facilitated meetings, but this requires a mutual will to establish a civil dialogue. Importantly, PAO leadership emphasized to me the value of more regular dialogue between the SIU and the police community.

In comparison to the police community, meetings with community groups have been more difficult to organize primarily due to their limited resources and lack of familiarity with the SIU. In an attempt to mitigate these shortcomings, a Director's Resource Committee, comprised of representative members of the community was formed early in 2002. Some police groups, however, expressed concern over the absence of an equivalent committee for police interests. Obviously, all such dialogue is not about specific cases which are active, but is to

promote better general understanding and transparency in order to foster the confidence of SIU stakeholders.

This consultation explored the possibility of occasionally merging the meetings between the SIU and the police and those between the SIU and community groups into larger joint meetings. Reaction to this proposal was mixed with both support and concern emanating from police and community groups alike. One concern was that the clear need for such interaction transcended SIU matters and might be requesting this investigatory body to step beyond its core responsibilities. Nevertheless, the value of broad dialogue, including the need for the re-opening of the lines of communication between the SIU and the PAO, was recognized by all parties. It might be appropriate for the Attorney General to request a few leaders from the stakeholder groups to meet and assess the practicalities of institutionalizing joint meetings including their timing, locations, scale, appropriate sponsoring bodies, appropriate participants and typical topics. Broadly attended conferences such as Toronto's 2000 Conference on Alternatives to Lethal Force by Police are important social capital investments which foster understanding and innovative policy initiatives.

Recommendation 22:

The Special Prosecution Unit should be much better resourced and its standing within the Ministry of the Attorney General restored.

Since my previous report, the Special Prosecutions Unit has been re-named "Justice Prosecutions" to more accurately reflect its unique and important role within the Ministry of the Attorney General in prosecuting those in the justice sector who are charged by any authority. Thus, the mandate of Justice Prosecutions is to take carriage of cases involving allegations of serious offences/conduct alleged to have been committed by justice officials, and while not limited to SIU-related charges, SIU charges represent a core of the Unit's work.

The Ministry of the Attorney General reported that the Unit is staffed by its full complement of six counsel, including the Chief Counsel. The *curriculum vitae* of these lawyers were provided to me. I was advised that experience has shown this to be sufficient staffing to handle the normal caseload of the office. When exceptional resource demands are placed on the office, the Chief Counsel is able to draw on experienced prosecutors within the Crown Law Office - Criminal or other Regions within the Criminal Law Division who appreciate the challenging nature of this Unit's cases. I was also advised that Justice Prosecutions has been successful in attracting some of the most senior and well-respected prosecutors within the Ministry through a secondment process. In addition, the Unit employs mid-level and junior counsel who take carriage of less serious matters and/or assist senior counsel on sensitive or complex files. Through the combination of the secondment process and the development of new counsel, the Ministry of the Attorney General expressed confidence that Justice Prosecutions will continue to be able to draw on seasoned prosecutors with the necessary experience to handle these difficult cases.

However, the perception of the resourcing of this Unit has been mixed. Some community groups and a few police association lawyers expressed the concern that the Unit is inadequately staffed. Other police association lawyers expressed the view that the Unit is very well staffed. While there has been no question regarding the dedication and commitment of the lawyers in the Unit during the last three years, they are often perceived as hampered by a lack of experience.[37] The recent addition of one senior counsel brings its senior counsel complement up to three including its very experienced Chief Counsel, James K. Stewart. There has apparently been a 100% turnover of the lawyers, possibly as part of a "three-year stint" policy of the Ministry. Obviously, such a policy must balance needed renewal with its attendant losses of experience and efficiency. Many

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[37] C. Blatchford, "It was a fight outdoors and a massacre in court" *National Post* (19 December 2000) A12.

participants in this process saw the current balance of renewal and experience as imperfect. A three-year stint policy is a function of the "intensity" of the Unit's cases and human resource planning within the Ministry. Community leaders, however, worry that it is also a function of a perception in the Crown Attorney community that working in the Unit is something akin to "going to the dark side". Anecdotal evidence of alleged hostile treatment of SIU investigators and prosecutors by local justice officials during trials may confirm this latter belief. The SIU also worries that the Unit's workload sometimes interferes with the provision of timely advice.

Community groups contended that the Government's investment in the competence and independence of the SIU will be defeated or compromised without a correlative commitment to the Justice Prosecutions Unit. Community confidence, they argued, demanded independence and competence in the handling of these unique cases from the laying of an information until the completion of the trial. These racialized community groups argued that public perceptions of prosecutorial independence and competence were as important as these attributes existing in fact. For example, I was asked if the Unit had a mission statement outlining to the public its role and commitment to independence and whether its members were *regularly* trained for its challenging cases and for racial awareness. Finally, some community leaders were sufficiently concerned to suggest that the Government should consider retaining senior outside counsel to prosecute SIU cases as is apparently the approach in Manitoba.

My meetings with senior Ministry officials responsible for the Unit reviewed these issues and concerns. They pointed out that the Crown Attorney's role, by its very nature, demanded independence[38] and they suggested that community groups

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[38] Nova Scotia, Royal Commission on the Donald Marshall, Jr. Prosecution, *Royal Commission on the Donald Marshall Jr. Prosecution*, vol. 1 (Halifax: The Commission, 1989) at 241 [hereafter Marshall]. See also Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: The Committee, 1993) at 31,

were simply unaware of the resources available to the Unit. On the issue of independence, it was emphasized that a public prosecutor is a quasi-judicial officer and an agent of the Attorney General who must maintain a distance from the police in order to have the detachment necessary to carry out the role of an independent legal adviser. The policing function is distinct from the prosecuting function and a police officer is not a "client" who can retain and instruct counsel. Therefore, Ministry officials stressed the inherent independence of the Crown Attorney as an agent of the Attorney General – an independence which explained why the Director of the SIU now reports to the Attorney General.

Ministry officials said that community groups also had to understand that a Crown prosecutor occupies the dual role emphasized by the Royal Commission inquiry into the prosecution of Donald Marshall.[39] He or she must prosecute vigorously those accused of a crime. But, on the other hand, a Crown counsel must ensure that the power of the state is used only in the pursuit of impartial justice. While the perspective and interests of the victim should be taken into account throughout the prosecution process, the prosecutor is not the victim's lawyer. Thus, requests to retain senior outside counsel "with fire in their bellies", confused the role of private lawyers with the responsibilities of Crown Attorneys.

Nevertheless, Ministry and Justice Prosecutions Unit officials were willing to meet with community groups to discuss these issues – indeed, they were willing to meet with all stakeholders. They were also open to crafting a mission statement; to reviewing the adequacy of staffing; and to reviewing the Unit's training needs in all respects. Nevertheless, officials forcefully rejected that the Justice Prosecutions Unit's administration and competence, whether in fact or in perception, in any way impaired the Government's investment in the SIU. They

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Boucher v. The Queen (1954), 110 C.C.C. 263 at 270 (S.C.C.) and *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276 at 289 (Ont. C.A.).

[39]Marshall, *ibid.*

also rejected that the Justice Prosecutions Unit can be fairly evaluated on the basis of the number of convictions obtained.

Recommendation 23:

All Ontario police officers should be provided with ongoing training concerning SIU procedures. There should be similar training at police colleges.

Significant progress appears to have been made in regard to the training of Ontario police officers concerning SIU procedures. The work of the SIU is now a regular part of police recruit training at the Ontario Police College where senior SIU personnel give presentations to the recruits. Similar training occurs at Toronto's C.O. Bick College.

The SIU reports that its role and work are also featured prominently in the curricula in policing courses in university criminology programs and in college-level police foundation courses where SIU personnel regularly attend to teach about the SIU and its operations. We saw that at the senior police leadership level, the SIU is a component of the Senior Police Leadership Course run by the Rotman Institute on behalf of the OACP. The SIU has also taken steps towards a broader public education program with Crown Attorneys. It continues to advocate for a more formal education and training curriculum for Crown Attorneys, along the same lines pursued with the policing community, to prevent, for example, the occurrence of problems that may arise in relation to parallel cases.

Recommendation 24:

The Ministry of the Attorney General should ensure that the tenure and compensation of the Director of the SIU are commensurate with the responsibilities of this important office.

The current SIU Director has been appointed by Order in Council for a five-year term. This compares favourably with the prior practice of one-year appointments. Remuneration for the Director is consistent with the remuneration of Assistant Deputy Ministers at the Ministry of the Attorney General. Independence of the Director's position is reinforced by the absence of merit pay and the associated performance assessment. The Director noted that he has never experienced any case-specific interference on the part of the Attorney General or the Deputy Attorney General. It was observed by some participants that to achieve a truly independent status for the SIU, it would be necessary to adopt something similar to the model in place for the Ombudsman's Office in which the Ombudsman is an officer of and reports to the Legislature.

As we have seen, the independence that is enjoyed by the SIU Director has been subject to the criticism from the police community that the Director lacks real accountability. For example, it was contended that whenever criticism or complaints were made to the Attorney General, the complaint was referred to the Director of the SIU. Therefore, the police community suggested that members of the SIU and the Director be held accountable through a mechanism similar to that for police officers in the *Police Services Act* and that there also be recourse for the police to an appeal or mediation mechanism whenever there is a dispute related to the conduct of an investigation. Community groups, as noted, vigorously rejected these "oversight over oversight" proposals and noted that the accountability mechanism in the *Police Services Act* was appropriate for the police officers who are given extraordinary powers and carry weapons. However, such accountability was not appropriate for the SIU whose role is solely to investigate the police in very narrow circumstances. Police officers are also, and have the security of,pu blic office holders.

Community groups questioned how an unprecedented appeal or mediation mechanism could be designed for an ongoing criminal investigation without becoming a tactical sideshow. There is no known equivalent applied to the

decisions made by police in the course of a criminal investigation. The concern was also expressed that such an appeal mechanism could be used as a vehicle to delay and frustrate an SIU investigation by well-resourced police associations. Furthermore, community groups pointed out that the Director is accountable to the Attorney General and through the Attorney General to the Legislature. The Director and SIU are also accountable to the courts and the Ombudsman. The SIU instituted a Complaints Policy under its General Order 005[40] that sets out how a complaint may be lodged against one of its employees. Any related discipline can be grieved by the employee to an independent arbitrator constituted under a collective agreement.

The request by some police associations that charges by the SIU only be laid after the approval of three Crown counsel is inconsistent with Ontario's policy of independence between Crown counsel and police investigators. Police officers exercise their discretion in conducting investigations and laying charges entirely independent of Crown counsel. However, Crown counsel screen all informations laid including those laid by the SIU's Director. Charge screening is based on the standards of "reasonable prospect of conviction and public interest".[41] Pursuant to this policy, SIU charges were recently withdrawn against an OPP police officer.[42]

Recommendation 25:

The Ministry of the Attorney General should consider charging the Dispute Resolution Centre with the responsibility of designing and providing specialized facilitation services to parties in SIU matters who may wish to pursue conciliatory discussions.

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[40] Although issued in November 2001, apparently no one has ever complained pursuant to this right.

[41] Practice Memorandum to Crown Counsel, Criminal Law Division, Re Charge Screening, PM [2002] No. 5 (1 October 2002). See also Practice Memorandum to Crown Counsel, Criminal Law Division, Re Recanting Witnesses, PM [2002] No. 7 (1 October 2002).

[42] See OPPA, Press Release, "OPPA Welcomes Withdrawal of Charges Against Officer" (23 October 2002).

In my previous report I noted that some parties saw the need for a voluntary forum to be made available to interested parties to pursue conciliatory discussions. Such a forum was thought to be an appropriate vehicle to allow those involved with a death or serious injury to speak openly about the impact of the incident on their lives. Participation would be strictly voluntary and without prejudice. The hope was that such facilitated discussions could obviate the need for lawsuits and continuing anxiety.

While this recommendation was not formally implemented, the SIU has participated in a somewhat equivalent healing circle process as previously noted. The Nishnawbe Aski Nation also welcomes any opportunity to work with the SIU and police to promote the greater use of healing circles in this area. There is, as well, the opportunity for the parties to any incident to design their own mediation intervention consistent with the purpose of this proposal. In fact, I was retained, in my practice as a private mediator, in one particular dispute as many parties to this review were aware.

V. Conclusion

I am pleased to report my assessment that none of the concerns raised with me during this review constitute the type of systemic failure existing at the time of the original facilitation. Admittedly, many issues were identified and important differences exist between stakeholder groups and with the SIU. But civilian oversight is a complex instrument operating in an even more complex set of contexts. The existence of many issues is not unexpected. I suspect that if we took stock of any challenging policy instrument at a particular point in time, the audit would not look dissimilar to this report.

In terms of conflict, this is likely one of those areas of public policy where significant tensions between the participants are inherent if not normal. Civilian oversight exists at the crossroads of some very powerful and competing forces in

a society. Controversy and related emotional upset from time to time are to be expected. The parties, however, have made great progress on all fronts since and because of the implementation of the 1998 recommendations. There is a much better appreciation of each other's legitimate perspectives and an impressive confidence in the professionalism and integrity of the SIU.

The results of the implemented recommendations have been to better institutionalize the SIU within a racially diverse Ontarian society - an outcome for which all stakeholders, including the SIU, must be commended. Accordingly, I do not see a need or the opportunity for extending my involvement beyond the rendering of this report. Having carried out this review function, I have come to see this report as more in the nature of an audit for all of the affected parties as well as for the Ministry of the Attorney General. Everyone now has the opportunity to assess for themselves the progress that has been made in this important area of policing and to decide what further steps should be taken to enhance the performance of the SIU – an objective shared by all participants.

Finally, Mr. Attorney General, on behalf of all stakeholder groups, I thank you for the thoughtful decision of the government to initiate this review in recognition of the importance of the SIU and the need for its continuous improvement. I also wish to thank all those organizations and individuals who gave freely of their time to participate in the review and provide me with their valuable advice.

Appendix I

Terms of Reference

Terms of Reference for Facilitator

The Honourable George Adams, Q.C. will evaluate the success of the 1999 SIU reforms (e.g. the SIU Regulation and budget increase) after consulting with interested police and community stakeholders.

Mr. Adams will hold facilitated discussions and negotiations to determine if there is consensus on any necessary clarifications to the SIU Regulation.

If, after completing discussions on the reforms, Mr. Adams is able to identify additional SIU-related issues that are likely, in his opinion, to be resolved by a facilitated process, he will proceed to develop consensus recommendations on those issues upon the approval of the Ministry.

Mr. Adams' role is to assess views and facilitate the development of consensus recommendations and not for the purpose of giving legal advice.

Mr. Adams may conduct the process in the manner he determines to be appropriate having regard to all the circumstances.

Mr. Adams will report to the Ministry the views of the stakeholders and any consensus recommendations, if he deems it appropriate, having regard to his role and after having consulted the interested parties.

Any notes, records, recollections, statements made and documents produced by Mr. Adams or provided to him during the process would be confidential and the disclosure of such material to any person including the government would, except as required by law, be within his sole discretion.

Appendix II

Meeting Dates and Groups and Individuals Consulted

Meetings were held on the following dates:

October 9, 11, 15, 18, 19, 22 and 23
November 8, 9, 16, 19, 20 and 21
December 2, 6 and 13

The Groups and Individuals consulted were:

Aboriginal Legal Services of Toronto
African Canadian Legal Clinic
Bromley Armstrong
Black Action Defense Committee
Canadian Association of Black Lawyers
Canadian Civil Liberties Association
Julian Falconer
Hamilton Police Service
Jamaican Canadian Association
Metro Toronto Chinese & Southeast Asian Legal Clinic
Ministry of the Attorney General - Criminal Law Division
Nishnawbe Aski Nation
Ontario Association of Police Services Boards
Ontario Association of Chiefs of Police
Office of the Chief Coroner
Ontario Civilian Commission on Police Services
Ontario Provincial Police
Ontario Provincial Police Association
Peel Regional Police Association
Police Association of Ontario
Peter Rosenthal
Special Investigations Unit

Thunder Bay Indian Friendship Centre

Thunder Bay Police Association

Thunder Bay Police Service

Toronto Police Association

Toronto Police Service

Toronto Police Services Board

Urban Alliance on Race Relations